

CLOSING THE GAP:
CLOSING TRANSACTIONS IN AN ELECTRONIC AGE

The landscape of commercial transactions and the traditional “closing” has changed drastically. More and more, we are utilizing the electronic gadgets at our fingertips to negotiate and close transactions, and the concept of the traditional closing – *i.e.*, both parties on opposite sides of a conference table signing the documents laid out before them – is slowly fading away. Of course, even in 2014, traditional paper closings are still utilized, but one would be hard pressed to find a transaction that is not at least partially electronic. And it may not be long before all transactions, or at least the vast majority, are conducted entirely electronically.

Given the flow of funds and transfer of other rights and obligations between parties, it is important in every transaction, traditional or electronic, to know when the deal is actually done. In a traditional closing with original signature pages and final versions of documents in folders on the table, “closing time” is usually obvious to all. However, in this age of electronic communications, determining when the parties to a transaction are deemed to have executed a document, including which version of the document is final, may not be clear.

Generally speaking, as deal lawyers conducting transactions via email or otherwise electronically, we need to know

two things: (1) whether the substantive nature of the transaction permits it to be closed electronically, and (2) if so, what is required to evidence the closing – *i.e.*, what constitutes an electronic signature.

Let's test our knowledge with a quick quiz.

In an effort to create uniformity for commercial transactions, there is one federal law that governs all electronic transactions.

False. Despite the enactment of the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”) in the year 2000, 47 states have also adopted a version of the Uniform Electronic Transaction Act (“UETA”) and other uniform laws governing specific types of electronic transactions. Not only can these laws apply to transactions that are outside of the scope of E-Sign, they can also preempt E-Sign at times. Additionally, some states have eschewed uniformity for their own statutes. Florida has done both. Prior to adopting UETA, Florida enacted the Electronic Signature Act of 1996 (“ESA”). Interestingly, ESA is the law that continues to be applied to most electronic transactions in Florida. Although similar in intent and purpose – *i.e.*, the promotion of efficiency in commercial transactions – the laws are not the same, and their application can have different results. Not to

mention that different courts in different states can apply similar provisions of their respective UETAs statutes in dissimilar ways.

In Florida, the parties need to expressly agree to conduct a transaction electronically.

False. This is the very reason it is important to understand the applicable laws – to avoid entering into a contract unwittingly. Neither E-Sign nor ESA require any explicit or express advance agreement among the parties to conduct electronic transactions. And, although UETA requires an agreement, the agreement can be inferred from the parties’ conduct (including via the transaction itself). The continued use of email in the course of negotiations is often sufficient to evidence that conduct.

An electronic signature is all you need to form a contract.

False. The laws governing electronic transactions are not a substitute for substantive contract law. Notwithstanding the electronic nature of a transaction, substantive contract law will continue to govern whether an enforceable contract exists. In Florida, for example, an electronic signature is just one way of satisfying the Statute of Frauds to evidence some of the required elements – *i.e.*, offer and acceptance – of a contract.

Which of the following constitutes a valid electronic signature: (a) an email with a party's automated signature block, (b) an email with a party's automated signature block plus the sender's manually entered name, (c) an email that merely indicates the name of the sender or (d) all of the above?

It Depends. As indicated above, this is where governing law can be particularly important. UETA, E-Sign or ESA were drafted to be flexible and technology-neutral – to take advantage of the efficiencies in electronic communications and to provide room for changes in communication due to advances in technology. Essentially, each of these statutes defines an “electronic signature” as the use of an electronic symbol or process with intent to sign or authenticate, but the details of just what constitutes such a symbol or process are left to the courts. And the courts are all over the map in this regard.

Some states have found an email identifying the sender's name along with the act of sending it to be a sufficient electronic signature. Other courts have focused on the signature block and even distinguished between the automated signature block and an email that contains both an automated signature block and a manually typed name. In Florida, the courts have repeatedly recognized emails as effective electronic signatures,

but the courts have not indicated whether any of those cases was specifically based on the manner in which the emails were signed.

A digital signature and an electronic signature are the same thing.

False. Although sometimes used interchangeably “electronic signature” and “digital signature” are not synonymous terms. Digital signatures are a form of technology involving cryptography – *i.e.*, the transformation of messages into unintelligible forms and back again – that allows the signer and the receiver to verify the authenticity of the signature. In short, a digital signature is a type of electronic signature with a specific security feature.

A party's agent can bind the party simply by sending an email.

True. In some states, including Florida, an agent can bind the party it represents via an email exchange. And similar to the issue with substantive contract law, one must look at the substantive law of agency in determining the scope of the agent's authority, as well as to the issues arising in the electronic contracting context.

A lawyer's email can bind the lawyer's client.

Maybe. At least one court has found a lawyer's email to be a valid electronic signature binding

the lawyer's client where the client had not signed-off on the express terms of the lawyer's email, but where other facts indicated the client's agreement with the terms of the lawyer's email, including the client's presence at a mediation where such terms were discussed. The Florida courts have not yet addressed this specific issue.

If an email contains an electronic signature, attached draft documents will be deemed to be signed.

It Depends. Florida courts have not yet addressed this particular issue. However, at least one other state court has interpreted its UETA to draw a distinction between electronically signing an email and electronically signing an attachment. The court determined that the attachment was not signed because the parties did not intend the attachment to be a final document. The court made that determination based on the lack of signatures in the signature blocks of the attached document and subsequent emails exchanged between the parties that indicated the parties were exchanging drafts.

In light of the law governing electronic transactions and its application, what should deal lawyers consider?

In a transactional world where parties typically seek to exchange signatures via emails of signature pages in pdf format, practitioners

need to recognize that under ESA, UETA and E-Sign, such an exchange of signature pages is not necessarily required in order for a contract to be deemed executed. Thus, perhaps now more than ever, parties and their lawyers need to be cautious about the contents of their communications and the contingent nature of their negotiations.

In varying degrees, lawyers in practice have tried to address some of these issues. For example, often emails transmitting drafts of documents or revised deal terms will state that the attached documents or proposed deal revisions are still subject to the lawyer's client's review and comment. Without definitive determination about whether a lawyer can bind the lawyer's client by the lawyer's own electronic signature, including such language in transmittal emails seems wise.

Similarly, when exchanging pdf signature pages via email prior to finalizing certain aspects of a deal, most lawyers will include email instructions that the signature pages are to be held in escrow until release is authorized. Here, a lawyer might want to be clear that such an authorization will only be deemed effective if it is written and from the lawyer's firm (or even a specific person within the firm, if appropriate). The lawyer could further clarify that at no time prior to such authorization shall any of the applicable

agreements be considered executed, whether electronically or otherwise.

To address when an electronically negotiated deal or parts thereof may be deemed final, lawyers should consider whether to include language in the binding provisions of a letter of intent clarifying when the parties will be deemed to have executed binding transaction agreements. For example, such a provision might state that no agreement negotiated by the parties would be deemed executed until the parties have exchanged either original or pdf versions of the parties' handwritten signatures. Parties engaged in negotiations via email without a letter of intent may want to consider including in an email at the beginning of the negotiations a similar statement about an acceptable process for the exchange of signatures. At a minimum, such a statement likely would create a condition that needs to be satisfied before a Florida court would deem a contract to be signed.

Additionally, because changes to documents immediately prior to a closing are often delivered piecemeal, a lawyer should make sure the final completely compiled document with signature pages inserted is circulated quickly after closing. Similar to final documents at traditional closings, all such compilations should be thoroughly checked for any changes that were agreed upon

but not previously circulated in revised draft form.

The one thing that is clear about electronic transactions is that best practices dictate that lawyers expressly state what is and is not intended as a final, executed document when transacting business and closing electronically. If a gap is created between the application of law and the desire in commercial transactions to take advantage of the efficiencies created by electronic communications (and each technological advancement that comes with them), it's the lawyers' duty to close that gap. Overkill may be our best friend.

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