

THE REAL ESTATE PRACTICE GROUP

CLIENT ALERT:
An E-Mail Exchange May Create a Real Estate Contract

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Negotiations occurring over e-mail may, in certain circumstances, create a binding contract. E-mail is now the most common means of communication among business professionals and continues to have a seemingly "informal" character. Despite its casual tone, an e-mail or a series of e-mails may satisfy the legal criteria to create a binding contract. Business professionals should consider using a disclaimer when negotiating through e-mail.

Both the federal Electronic Signatures in Global and National Commerce Act ("ESIGN"), which applies to all interstate and foreign transactions, and the Uniform Electronic Transactions Act ("UETA"), a version of which has been adopted in Colorado, provide that a contract and signature will not be denied legal effect solely because they are in electronic form. These laws facilitate business transactions by allowing parties to physically execute a contract and deliver an image of that signature through e-mail; they also allow parties to execute a legal document digitally through the use of software. The ability of contracting parties to send and sign contracts over e-mail increases the efficiency and ease of business transactions. Recently, however, courts outside of Colorado have interpreted ESIGN and statutes similar to the UETA to allow a binding real estate contract to arise through mere e-mail correspondence. Consequently, parties may find themselves bound to a contract as the result of an e-mail exchange.

Most, if not all, states have adopted a statute of frauds which typically requires that certain contracts, such as conveyances of real estate, agreements, such as leases, lasting longer than one year, and sales over a threshold amount (\$500 in Colorado) be in writing and "subscribed" by the party who would be obligated to perform. The statute of frauds was adopted to protect against the creation of a binding contract until the parties knowingly executed a formal legal document. The statute of frauds established a clear standard by which to assess whether the parties "intended" to be bound by a contract and was thought by many to be sufficient protection to preclude e-mail correspondents from entering into a binding contract through an exchange of e-mail messages. The decisions described below, however, indicate that an expression of the intent to be bound may be found in an e-mail exchange coupled with an electronic signature.

The Supreme Court of New York, Appellate Division (which is an intermediate-level appellate court) held in two recent cases involving real estate that a binding contract can arise through negotiations over a series of e-mail messages. In *Naldi v. Grunberg*, the court stated that the terms "writing" and "subscribed" should now be construed to include, respectively, records of electronic communication (such as e-mail) and electronic signatures. In its analysis, the *Naldi* court relied heavily on ESIGN, New York's Electronic Signatures and Records Act and, even though it has not been enacted in New York, the UETA. Although the court ultimately held that the right of first refusal in question was not enforceable, it did so on the grounds that there was no "meeting of the minds" of the parties and, therefore, no agreement or contract.

In *Newmark & Company Real Estate Inc. v. 2615 East 17 Street Realty*, the Supreme Court of New York, Appellate Division, citing *Naldi*, ruled that an e-mail under which the sending party's name is typed can constitute a subscribed writing for purposes of satisfying the statute of frauds. In this case, the court held that a broker accepted a landlord's counteroffer, consisting of e-mailed comments to a brokerage agreement, when the broker returned the agreement to the landlord through e-mail with all of the landlord's comments incorporated. The court concluded that the landlord was bound to the agreement and that the exchange resulted in a "meeting of the minds." The court's conclusion was based, at least in part, on the fact that the landlord did not reject or object to the broker's final e-mail, a fact the court apparently construed as an expression

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of intent to be bound by the e-mail exchange.

These cases are not binding in Colorado, and Colorado courts have not yet addressed the specific question as to whether an agreement reached through e-mail correspondence combined with a typed signature satisfies the statute of frauds. Nonetheless, business professionals should be careful when conducting negotiations through e-mail. ESIGN governs matters in or affecting interstate commerce, and Colorado has adopted a version of the UETA, which could provide a basis in Colorado for rulings similar to that of *Naldi* and *Newmark*.

In order to avoid inadvertently entering into a contract or modifying a contract through e-mail, business professionals should consider including a disclaimer, or other clear indication that an e-mail is not intended to be binding on the sender, in any e-mails that are part of their negotiations and/or that include draft documents.

For more information on this Client Alert, please contact any of the attorneys in the Real Estate practice group (for a listing, [click here](#)).

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