



Sign of the times

When done properly, electronic signatures are binding

by James A. Fredericks and Alison S. Marischen

Electronic signatures are the latest stride in the march of technology to expedite document execution and enforceability of the deal. It was not that long ago that we used typewriters and carbon paper, and documents were not enforceable in our courts unless they contained original signatures. We now use, and courts routinely accept, copies of all types and facsimile signatures.

The Electronic Signatures in Global and National Commerce Act (“E-Sign”), enacted nearly eight years ago, was the federal response to a growing state-by-state movement to permit electronic signatures.

effect, validity or enforceability solely because it is in electronic form;

- 2) 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.

Simply stated, the E-Sign law and UETA provide that, if all other components are present, a party cannot defeat the validity of a contract simply because it has an electronic signature.

Make no mistake, dealing in electronic mediums does not eliminate

Currently, neither UETA nor E-Sign requires or mandates electronic transactions or signatures; however, this is not to say that they won’t sometime in the future. The true transition to complete electronic transactions in the commercial real estate context will depend primarily upon the adoption of such technology by the service providers in commercial real estate—lenders, brokers, title companies and county recorders offices. These players will be the driving factor for buyer/sellers or landlord/tenants in deciding to move to a strictly electronic format.

Both the federal E-Sign law and the state UETA were designed to address all aspects of commerce, primarily online consumer business transactions, but, as discussed, these laws definitely impact commercial real estate. Many more components of a commercial real estate transaction take place electronically than a decade ago, and ever-changing technology facilitates more of this each day. Accordingly, the technology and its applications should be promoted and understood by all parties. Nonetheless, resistance to completely electronic transactions will understandably always be present because deals are still made through traditional relationships with the parties establishing a rapport and trust with one another. □

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Prior to the passage of the E-Sign law, there were variances in many state laws on the use and enforceability of electronic transactions. As a result, the Uniform Electronic Transactions Act (“UETA”) was created and many states adopted it. UETA is only applicable in those states that have adopted it, but the E-Sign law is applicable nationwide on a federal level.

The E-Sign law says:

- 1) A signature, contract or other record relating to such transaction may not be denied legal

or change the traditional elements required to make a contract.

Establishing expectations is crucial to all parties making the real estate deal. The parties can expressly agree to the method and manner by which they will be bound under a contract (i.e., original signed documents, facsimile copies or e-mail acceptance). However, as court cases have shown, in the absence of an express “agreement” between the parties on such method and manner, the court may infer it from the parties’ acts and intentions.