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SETTLEMENTS IN THE ELECTRONIC AGE

[Ref: Law of Contracts, Para. 2.04]

One of the most significant tasks a claims professional performs is to resolve disputes and negotiate settlements. Settling a claim benefits all parties involved and in an era when communicating electronically is commonplace, it's important to have a fundamental understanding of how courts analyze electronic settlements.

It begins and ends with basic contract law. A binding settlement is a contract and is governed by fundamental contract principles. What this means is that a court will only uphold a settlement if there is a meeting of the minds on all material terms. This is true whether the parties create a contract by oral agreement or through a traditional written document.

Settlements consummated by email are no different. In jurisdictions that do not require a formal document signed by the parties, the courts will examine the email exchange to determine whether there was legal capacity to contract, a definite offer, unconditional acceptance, and consideration. If all of these elements are present and there is no fraud the settlement will be upheld. It gets more complicated, however, in states that require a signed settlement document. Because email cannot be signed in the traditional sense, these courts must determine whether the parties intended to sign the email and, if so, whether their purported signatures are valid electronic signatures.

APPLYING FUNDAMENTAL CONTRACT LAW TO EMAIL

Some states do not require settlement agreements to be signed by the parties. When a purported settlement is challenged in these jurisdictions the legal analysis is fairly straightforward and requires the courts to apply fundamental contract law. In *Conway v. Done Rite Recovery Services, Inc*. 2016 U.S. Dist. LEXIS 159439 (N.D. Ill. 2016), the court used what it described as "ordinary contract principles" to uphold a settlement that was reached by email exchange. The case involved a defaulted car loan and the defendants made a settlement offer in an August 14, 2015 email:

> 1) Waiver of the balance due on the account – per our records $5,889.58 is owed to date; and 2) $2,000.00 conditioned upon our receipt of your W-9, agreement to confidentiality, release of all claims, a dismissal of the case with prejudice as to both Credit Acceptance and Done Rite within 15 days of the receipt of the settlement check.

> We'd also agree to trade line deletion here with regard to credit reporting.

The defendants contended that the plaintiff accepted the offer the same day by emailing: "I accept offer please call." The plaintiff, however, never executed the formal settlement documents drafted by the defendants, and never returned his W-9. As a result, the defendants filed a motion to enforce the settlement and the court, applying basic contract law, ruled in their favor:

> Applying these fundamental principles to the case at hand leads to the conclusion that by virtue of the exchange of emails on August 14, 2015, the parties entered into an enforceable settlement agreement. ... The email correspondence clearly shows that Defendants made a settlement offer and stated the terms of the offer, and Plaintiff unambiguously accepted the offer. The material terms of the settlement agreement are sufficiently definite, as Defendants clearly lay out that Defendants offered Plaintiff (1) waiver of the $5,889.58 balance due of his account, (2) a payment of $2,000 and (3) deletion of Plaintiff's trade line, conditioned upon Plaintiff (1) supplying Defendants with a W-9, (2) agreeing to confidentiality, (3) releasing all claims, and (4) dismissing the case with prejudice as to both Defendants within fifteen days of receipt of the settlement check. Although the plaintiff never signed the formal settlement agreement, the email exchange constitutes a binding agreement since the parties did not expressly condition their agreement on the signing of the formal document.

Even when there is ample proof of an offer, acceptance, and consideration, a party's lack of capacity can be a roadblock to forming a binding contract. Legal capacity impacts a person's ability to enter into a binding agreement and makes some contracts voidable at the option of the party who lacks that capacity. This serves a longstanding public policy of protecting those who are incapable of understanding the nature or consequences of an otherwise legally binding agreement. Minors and those suffering from some form of mental illness or state of intoxication have all been deemed to lack legal capacity to contract. What this means is that in certain situations courts will allow these parties to avoid their contractual obligations. But how would a court analyze legal capacity in the context of an email?

In *Gonzalez v, Jurella*, 2015 U.S. Dist. LEXIS 175876 (D. Conn. 2015), the plaintiff claimed that a settlement negotiated via email was invalid because he was under the influence of alcohol and marijuana while he was corresponding with the defendants. Ruling against the plaintiff, the court applied the Restatement (Second) of Contracts, which provides that a contract is voidable at the election of an intoxicated party if the other party had reason to know of both the intoxication and that the intoxicated party was unable to understand the nature and consequences of the transaction or was unable to "act in a reasonable manner" in relation to the transaction. The court said:

> In the instant case, there is no indication that the defendants knew, or should have known, that the plaintiff was intoxicated, or that as a result of his intoxication he was unable to understand in a reasonable manner the nature and consequences of the transaction. The relevant emails appeared coherent. They were sent in the middle of the day, and in rapid succession. They do not contain typographical errors or other indications that Mr. Gonzalez was not in possession of his faculties. The amount of the proposed settlement was consistent with the parties' prior settlement discussions. Nothing about the interaction should have caused counsel for the defendants to suspect that Mr. Gonzalez was intoxicated. Furthermore, the fact that Mr. Gonzalez was capable of engaging in the discussion at all indicates that he was not "utterly deprived of the use of his reason" at the time.

The courts in these two cases applied fundamental contract law to email settlements just as they would with any other settlement agreement. But it's important to keep in mind that these cases also had one other important thing in common: they were decided in jurisdictions that did not require the email to be subscribed or signed by the parties. The legal analysis is more complicated when an electronic signature is required to create a binding settlement.

WHAT IS AN ELECTRONIC SIGNATURE?

The Uniform Electronic Transactions Act (UETA) was enacted in 1999 for the purpose of creating uniform rules to govern electronic commerce. The UETA aims to give the same legal effect to electronic documents and electronic signatures as paper documents with traditional signatures. Most states have adopted the UETA. An important aspect of the act is its definition of "electronic signature." The UETA defines electronic signature as:

> An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.

The validity of electronic signatures is often called into question in disputes involving electronic transactions. With email settlements, the key is to determine whether the party who allegedly signed the agreement intended to do so. The two cases that follow have similar facts but the courts reached different conclusions. In both cases, however, intent was the critical factor in the court's analysis.

Forcelli v. Gelco Corporation, 2013 N.Y. App. Div. LEXIS 5354 (N.Y. App. 2013) involved a three car accident. Plaintiff Forcelli was driving one of the autos, while the other two were driven by defendants Mitchell Maller and Steven Kuhn. Maller's car was owned by Gelco Corporation, leased by his employer, Xerox Corporation, and insured by Sedgwick CMS. After an unsuccessful mediation, a claims adjuster from Sedgwick, Brenda Greene, contacted the plaintiff's counsel by phone and offered to settle for $230,000 on behalf of Maller, Gelco, and Xerox. Plaintiff's counsel orally accepted and Greene sent the following email to both him and Xerox on the same day:

> Per our phone conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case. Please have your client execute the attached Medicare form as no settlement check can be issued without this form.
>
> You also agreed to prepare the release, please include the following names: Xerox Corporation, Gelco Corporation, Mitchell G. Maller and Sedgwick CMS. Please forward the release and dismissal for my review. Thanks Brenda Greene.

Forcelli signed the release on May 4, 2011. In the meantime, Gelco and Maller had a summary judgment motion pending against the plaintiff, which was granted on May 10, 2011. It was not until May 11, 2011 that counsel for Gelco and Maller received an email alert that the motion was granted. On the same day, the plaintiff forwarded the signed release to Greene. Faced with settling claims that had already been resolved in their favor, Gelco and Maller challenged the validity of the release on two fronts: (1) whether Greene had authority to settle on their behalf, and (2) whether Greene's email complied with a New York statute, CPLR 2104, that required settlement agreements to be in writing and "subscribed" by the party or the party's lawyer. More specifically, the court had to determine whether Greene's act of typing "Thanks Brenda Greene" at the end of the email satisfied the statute's requirement that the agreement be subscribed. Before reaching this issue, however, the court confirmed that Greene's email contained all of the elements needed to create a binding contract and that she had the authority to settle:

> Here, Greene's email message set forth the material terms of the agreement, to wit, the acceptance by the plaintiff's counsel of an offer of $230,000 to settle the case in exchange for a release in favor of the defendants, and contained an expression of mutual assent. Significantly, the settlement was not conditioned on any further occurrence, such as the outcome of the motion for summary judgment or the formal execution of the release and stipulation of dismissal by these defendants and related entities. ... The record clearly demonstrates that Greene, as a representative of the Gelco defendants' insurer, was clothed with apparent authority to settle the case on behalf of the insured. Indeed, the Gelco defendants did not dispute the assertion by the plaintiff's counsel that it was represented to him at the mediation that Greene had the authority to settle the case on behalf of these defendants, and they do not dispute this assertion on appeal. Thus, Greene's email message also satisfied the criteria of CLPR 2104 insofar as it was a writing made by an individual with authority to bind the party to be bound.

Addressing whether the email was properly subscribed with "Thanks Brenda Greene" the court pointed out that emails cannot be subscribed in the same way as letters, which can be physically signed. But it reasoned that it would not make sense, given the widespread use of email as a form of written communication in both personal and business affairs, to rule that the email did not comply with CPLR 2104 merely because it could not be physically signed by the parties. Significantly, the court added that its conclusion was supported by the underlying purpose of New York's Electronic Signatures and Records Act:

> Indeed, such a conclusion is buttressed by reference to State Technology Law, former article I, "Electronic Signatures and Records Act," which was enacted by the legislature in 2002. In the accompanying statement of legislative intent, the legislature stated in part: "This act is intended to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents" ... Section 302 (3) of this statute states that an "electronic signature shall mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." Section 304 (2) of the statute states that "an electronic signature may be used by a person in lieu of a signature affixed by hand and the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."

The court acknowledged that while Greene's typed name did not strictly comply with the statute's definition of electronic signature, it concluded that it was "in effect" a signature because it was clear that Greene purposefully added her name to the bottom of the email, rather than her name being automatically generated by a preprogrammed email software program. The idea that Greene intended to subscribe the email was bolstered by the telephone calls between her and plaintiff's counsel that occurred before the email. The court concluded:

> Accordingly, we hold that where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing.

Compare *Forcelli* to *JBB Investment Partners v. Fair*, 232 Cal. App. 4th 974 (Cal. App. 4th

2014), in which a California appellate court analyzed similar facts and came to a different conclusion. As in *Forcelli*, the key issue was intent.

In *JBB Investment Partners* the dispute involved allegations of fraud in a business relationship and an alleged settlement that arose from numerous emails, text messages, and phone discussions. California's Code of Civil Procedure section 664.6 required a signed writing by all parties to create a valid settlement when the settlement was consummated outside of court. The trial court determined that there was a meeting of the minds, but the issue on appeal was whether defendant Tom Fair's typed name at the end of an email constituted an electronic signature within the meaning of California's UETA. The alleged signature was at the end of Fair's July 5, 2013 email in response to the plaintiffs' settlement offer sent via email on July 4, 2013 by one of the plaintiffs' attorneys, Giacomo Russo. The last section of the offer was at the heart of the court's analysis:

> WE require a YES or NO on this proposal; you need to say "I accept."... Anything less shifts all focus to the litigation and to the Court Orders we will seek now as well as in the future as well as the subpoenas we will serve. ... It is now up to you to decide whether you would resolve this amicably or not. Let me know your decision.

Significantly, the court noted that the email did not have a signature line or signature block and did not include the plaintiffs' signatures as required by California's Code of Civil Procedure. On July 5 Fair sent the following email response:

> Russo, the facts will not in any way support the theory in your email. I believe in Cameron. So I agree. Tom Fair.

At that time, Russo and another attorney for the plaintiffs, Ansel Halliburton, responded that they did not understand whether Fair was accepting or rejecting the offer. Halliburton said:

> Please be unambiguous, because I am about to file the complaint and ex parte papers unless we hear an unambiguous acceptance.

The plaintiffs filed suit and made an application for expedited discovery. They sent the suit papers to Fair via email. Fair responded by leaving Halliburton a voice mail and a text message that he agreed with the settlement terms. As a result, on July 11, 2013 Halliburton sent Fair a draft of the final settlement, which specified the names of the plaintiffs and defendants and advised that the agreement could be "signed and delivered by facsimile" or that it could be "electronically signed." Fair, however, wavered and sent an email to Halliburton stating that he had spoken to his accounting firm and that they suggested a meeting to discuss the plaintiffs' "unfounded suspicions" and "allegations." Fair never signed the July 11 settlement papers.

The appellate court acknowledged that a typed name at the end of an email could be an electronic signature under certain circumstances, but it ruled that there must be evidence of an "intent to sign the electronic document." The evidence in this case, at least in the eyes of the appellate court, was lacking:

> The exchange of email messages shows that the parties clearly agreed to negotiate the terms of the settlement by email, but plaintiffs did not demonstrate, as they must ... that the parties ever agreed to conduct transactions by electronic means or that Fair intended with his printed name at the end of his email to sign the electronic offer. The July 4 offer did not contain any statement indicating that the parties agreed to enter into a final settlement by electronic means. The plain language of the July 4 offer

> provided that “the Settlement paperwork would be drafted .” Additionally, this section advised that plaintiffs require “a YES or NO on this proposal; you need to say ‘I accept’.”... The last sentence in this section stated “Let me know your decision.” None of these sentences in the July 4 offer supports a conclusion that the parties agreed that Fair’s agreement to the proposal was an agreement to sign a legally binding settlement. ... Moreover, Fair’s subsequent voicemail and text messages from his cell phone did not indicate that he intended for his email to be a signature to the electronic record as he simply stated that he “agreed with” or accepted Russo’s terms.

The court added that subsequent correspondence from the plaintiff’s counsel advising that he would generate formal settlement paperwork provided further evidence that there was no settlement on July 5. To that end, the July 11 settlement documents included a signature line at the end of the agreement and specifically provided that electronic signatures would be valid:

> The July 11 writing provided: “This Settlement Agreement may be signed and delivered by facsimile and in counter-parts. It may also be electronically signed by each of the Parties through the use of EchoSign, DocuSign, or such other commercially available electronic signature software which results in confirmed signatures delivered electronically to each of the Parties, which shall be treated as an original as though in-signed by officers or other duly authorized representatives of each Party.” No similar language was in the July 4 offer and, as already stressed, the July 4 offer did not indicate that a printed name at the bottom of an email would be an electronic signature.

Finally, it’s worth nothing that the court in *JBB Investment Partners* distinguished the New York appellate court’s decision in *Forcelli* on the issue of intent. Specifically, the California court believed that the evidence in *Forcelli*, unlike the evidence in *JBB Investment Partners*, was more persuasive and clearly proved that the adjuster intended to subscribe the email:

> In *Forcelli*, the court explained that the face-to-face mediation at which settlement was attempted and the subsequent followup telephone calls between the parties supported the conclusion that there was an intent to *subscribe the email*. ... The court in *Forcell*i stressed the following: The email message “set forth the material terms of the agreement, to wit, the acceptance by the plaintiffs’ counsel of an offer of $230,000 to settle the case in exchange for a release in favor of the defendants, and contained an expression of mutual assent. Significantly, the settlement was not conditioned on a further occurrence, such as the outcome of the motion for summary judgment or the formal execution of the release and stipulation of dismissal by these defendants and related entities.” ... In contrast, here, Fair’s printed name was not at the bottom of the actual proposed agreement; Fair’s email was in response to the electronic offer. Furthermore, unlike the situation in *Forcelli*, the July 4 offer was conditioned on the formal writing of an agreement. Finally, and most significantly, as discussed fully below, the record in *Forcelli* showed an intent to subscribe the email; the record before us does not demonstrate that Fair intended to subscribe the email.

CONCLUSION

A contract is a bargained for exchange and can only be created when there is a meeting of the minds on all material terms. The intent of the parties is often the key issue when there is a dispute

about the existence of a binding contract and electronic settlements are no exception. When the jurisdiction does not require a signed document, courts will examine the email exchange to determine whether there was legal capacity, a definite offer, an unconditional acceptance, and consideration. If all of the elements of a contract are proved, the settlement will be enforced by the court. If the jurisdiction requires a signed settlement agreement, the court will often look to the state's version of the UETA to determine whether the email had a valid electronic signature. In cases in which a party's name is simply printed at the end of an email, the party's intent is once again the key issue and a court must determine whether the presence of the party's printed name at the end of an electronic document establishes the intent required to form a binding contract.