



ELECTRONIC SIGNATURE CASES

Wright vs. Direct Capital Securities, Inc., 2010 Cal App. Unpub. LEXIS 1335 (Feb. 24, 2010). E-SIGN Take-aways:

- Under California law, contract principles such as unconscionability and waiver can serve to invalidate an arbitration agreement that has been electronically signed.

The plaintiff, Scott Wright, filed a wrongful termination suit against Direct Capital, which then sought to compel arbitration based on the plaintiff's alleged agreement to arbitrate included in a "Form U-4 Uniform Application for Securities Industry Registration or Transfer" document. The court declined to compel arbitration after it found (a) the scope of the arbitration agreement to be unclear because Direct Capital failed to provide any evidence establishing what claims Mr. Wright agreed to arbitrate; (b) the arbitration agreement raised the specter of unconscionability because it was mandatory and only bound the employee; and (c) Direct Capital may have waived its right to compel arbitration.

Instead of a handwritten signature, the U-4 form contained a "Signature Section", which stated that "a 'signature' includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in the field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature." Following such "Signature Section," there was a separate subsection consisting of two full, single-spaced pages entitled "15A. Individual/Applicant's Acknowledgement and Consent." Such additional subsection included the following provision: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the SROs [self-regulatory organization] indicated in Section 4 (SRO Registration) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction." At the end of such subsection, Mr. Wright typed his name after the following statement: "Applicant or applicant's agent has typed applicant's name under this section to attest to the completeness and accuracy of this record. The applicant recognizes that this typed name constitutes, in every way, use or aspect, his or her legally binding signature."

The lower court held that it could not order arbitration without a signed agreement. Although Direct Capital asserted that the plaintiff had affixed his "electronic signature" on the "standard NASD form", the court concluded that there was no legal precedent allowing it to rely upon such a "signature" as evidence of an intent to arbitrate. Curiously, there is no mention of any electronic signature laws or any regulatory guidance on such signatures. The Court of Appeals did not address the issue of electronic signatures, but appears to have assumed such signature was valid.

ELECTRONIC SIGNATURE CASES CONTINUED

Adams vs. Quiksilver, Inc., 2010 Cal App. Unpub. LEXIS 1236 (Feb. 22, 2010).
ESIGN Take-aways:

- If multiple parties had access to an online agreement, the party seeking to enforce the agreement must prove which party actually signed the agreement.

Quiksilver, as the defendant, sought to compel arbitration pursuant to an online arbitration agreement allegedly signed by the plaintiff, Lynn Adams, who had filed a wrongful termination suit against Quiksilver. The court declined to compel arbitration because the defendant failed to establish that Ms. Adams had electronically signed the arbitration agreement.

Ms. Adams initially applied for a job with Quiksilver by submitting a resume on the Internet through a job search website. After interviews with a number of Quiksilver employees (including Mr. McClelland), she was informed she would be hired pending a background check. On April 9, 2008, Mr. McClelland called the plaintiff and asked for her middle name and Social Security number for the background check. The next day, Mr. McClelland emailed Ms. Adams a link to an electronic form and asked her to edit it because Quiksilver could not do the background check without such information. Ms. Adams was not required to create a log-on, but merely clicked on the link to access the form. At no time did Mr. McClelland mention an arbitration agreement. When she received the form, it was partially completed and included her full name next to the following sentence: “By typing my name, I fully understand the above Notice and Authorization.” Ms. Adams testified that she was certain she did not type her name in that form because she never uses her middle name in any signed documents. As further evidence of this practice, the plaintiff submitted copies of paper employment forms subsequently signed by Ms. Adams without use of her middle name.

In court, an employee of the software company that operated the electronic form testified that the form could be opened and edited by anyone who received the e-link. Furthermore, the employee testified that the software company’s database tracked the identity of each user who could have made changes to the plaintiff’s form and both McClelland and another Quiksilver employee had such access.

In support of plaintiff’s contention that she did not agree to the arbitration agreement, the court cited California Civil Code Section 1633.9, which states as follows: “(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable ...” The court held that there was “no electronic record of when Adams’s full legal name was entered in the space following the arbitration agreement.”

ELECTRONIC SIGNATURE CASES CONTINUED

Pepco Energy Services, Inc. v. Geiringer and SLG, Inc., 2010 U.S. Dist. LEXIS 4651 (E.D.N.Y. Jan. 21, 2010). E-SIGN Take-aways:

- Under New York's electronic signature law and E-SIGN, a letter attached to an email with a typed name at the end of the letter will not be deemed electronically signed unless there is a clear intent to sign such letter using an electronic signature (e.g., use of "/s/" or signature line with name above typed name).

The district court in this decision refused to grant the defendants' motion for reconsideration. The primary issue before the court was whether a certain letter that was critical to the lawsuit (the DePriest letter) was executed in accordance with the law of electronic signatures. Mr. DePriest's typed signature appeared on a letter that was electronically transmitted as an email attachment. The defendants asserted that the typed name on the letter constituted Mr. DePriest's electronic signature or, alternatively, the email itself constituted an electronic signature to the letter.

The judge disagreed with the defendants and stated that he deemed "a signature line and an electronic signature to be in the format used in [his] electronically filed orders." At the bottom of this order, the judge's signature appeared as follows: "/s/ William D. Wall". In the DePriest letter, there was no defined signature line and instead there was only "Mr. DePriest's typed name, title and corporate affiliation, in a format that would normally appear under a signature, not in place of one."

The court went on further to explain that the plaintiff had argued correctly, based on E-SIGN and New York's electronic signature law, that "an 'electronic signature' is 'an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.'" The court found that there was "ample evidence" that Mr. DePriest did not intend to sign the letter.

The Prudential Insurance Company of America v. Dukoff and Estate of Shari Dukoff, Case -07-CV-1080 (E.D.N.Y December 18, 2009). E-SIGN Take-aways:

- Under New York law, the party seeking to enforce an electronic signature on an insurance document must provide evidence that verifies the person providing the signature was indeed the person who signed such document.

In this decision, the Eastern District of New York denied the defendants' motion for summary judgment after the defendants had asserted that there was not a valid signature on the insurance application submitted to Prudential. Ultimately, Prudential settled this case for other reasons (namely, lack of clarity in drafting of the insurance application).

Initially, this case arose when Prudential sought to void a life insurance policy issued on the life of decedent, Shari Dukoff, for which her husband, Neil Dukoff, was the beneficiary. The application was filed electronically in the spring of 2004 through a

ELECTRONIC SIGNATURE CASES CONTINUED

standard Internet click-through process, whereby the applicant clicked on a button to submit the application to Prudential electronically. Before arriving at the signature page, the applicant was required to input his or her personal information, including his or her Social Security number and address. In the application, the applicant affirmed that Mrs. Dukoff had no negative medical history, including surgery or symptoms of cancer, within the previous five years. Prudential issued a policy dated June 1, 2004 in the amount of \$500,000. Mrs. Dukoff died from complications stemming from cancer on May 23, 2006. Prudential initially approved Mr. Dukoff's claim for payment under the policy, but later denied the claim based on material misrepresentations made in the application.

Both parties moved for summary judgment on a number of issues, but most relevant to this summary, the defendants argued that the statements made in the application cannot be used to rescind the contract because the application failed to comply with electronic signature and record laws.

The court found that there was a genuine issue of material fact as to who submitted the application for insurance. Prudential presented a computer printout showing the application was submitted on May 15, 2004, when Mrs. Dukoff was in the hospital recovering from surgery to remove a cancerous tumor. The defendants claimed the application was submitted in March or April of 2004. Although the evidence suggests that Mrs. Dukoff did not submit the application, Prudential failed to offer "sufficient evidence to prove that the printout accurately reflects the date of submission."

Asserting that this was the first time a court had addressed the validity of electronic signatures for insurance documents under the New York electronic signature law (ESRA), the court noted its deference to two opinion letters issued by the New York Insurance Department and held that Prudential could use statements made in the insurance application to challenge the insurance contract's validity only if Prudential could reasonably identify the individual who made them. Although the final signature page did not require identifying information, the applicant was required to transmit important identifying information to Prudential (e.g., address, Social Security number and physical description) when submitting the application electronically. Therefore, the court found that the defendants were not entitled to summary judgment because there was at least a triable issue of fact as to whether Prudential could verify that the person providing the electronic signature was the individual who intended to be bound by the application, as required by the Insurance Department's opinion letter.

The court also dismissed the defendants' motion that Prudential did not comply with the E-SIGN requirements relating to the use of electronic records (consumer disclosures specifically). Because there was no allegation that Prudential provided the defendants with any records in electronic form, the court held that 15 U.S.C.A. § 7001 of E-SIGN was not applicable. Prudential had delivered hard copies of both the Certificate of Insurance and application to the plaintiffs.

ELECTRONIC SIGNATURE CASES CONTINUED

Alliance Laundry Systems, LLC v. Thyssenkrupp Materials, NA, 570 F. Supp. 2d 1061 (E.D. Wisc. Aug. 5, 2008). E-SIGN Take-aways:

- A Wisconsin district court held that the Uniform Commercial Code (“UCC”), not Wisconsin’s Uniform Electronic Transactions Act (“UETA”), governed the substantive issue of determining whether a contract had been formed. Because the UCC does not prohibit the formation of contracts by electronic means, it was irrelevant whether the parties agreed to conduct business electronically, as is required by UETA.

This case arose from a dispute between a manufacturer of laundry equipment (plaintiff) and a seller and distributor of stainless steel (defendant). In May 2005, the parties entered into a written agreement for the supply of stainless steel. Later in the relationship, the plaintiff became delinquent with respect to payments owed to defendant for shipments of stainless steel. Plaintiff began purchasing steel from another supplier and did not renew the supply agreement after it expired at the end of 2006. Because defendant still had a significant amount of steel in inventory earmarked for plaintiff, an employee of defendant emailed an employee of plaintiff asking if plaintiff wanted to submit an offer for the left-over steel. Eventually, an employee of plaintiff sent an Excel spreadsheet with its offer to defendant and signed and mailed a purchase order to defendant. Defendant’s accounting department, however, wanted plaintiff to pay the past due balances prior to selling any additional amounts to plaintiff. Plaintiff eventually promised to pay past due amounts, but delayed in making such payments. Consequently, defendant sold the inventory originally promised to plaintiff to a third party. Plaintiff sued the defendant alleging that the email communications between the parties formed a binding contract in which the defendant promised to ship steel and plaintiff promised to pay for it.

Ultimately, the court held that neither party was entitled to summary judgment because there were still genuine issues of material fact about whether a contract was formed. In its analysis, the court noted that the Uniform Commercial Code (“UCC”), not the Uniform Electronic Transactions Act (“UETA”) would determine the substantive issue of contract formation and nothing in the UCC prohibits the formation of agreements by electronic means. The defendant alleged that under UETA, no contract was formed because the parties did not agree to conduct transactions by electronic means. The court noted, however, that UETA is not a general contracting statute and the substantive rules of contracts remain unaffected by UETA. Therefore, according to the court, if a jury determined that the parties’ emails were sufficient to form a contract, UETA would not prevent the enforcement of such contract. If the issue was whether an email signature constituted the signature required by the UCC, then UETA might be relevant. Regardless, based on the “context and surrounding circumstances, including the parties’ conduct,” it would be likely that UETA would deem the parties to have “agreed to conduct transactions by electronic means.” If such a finding were to be made, then an electronic signature would satisfy the UCC’s statute of frauds signature requirement for the sale of goods priced at \$500 or more.

ELECTRONIC SIGNATURE CASES CONTINUED

Stevens v. Publicis, S.A., 2008 NY Slip Op. 02880 (April 1, 2008). ESIGN Take-aways:

- Under New York law, a series of emails can effectively amend a written employment agreement.

In this decision, a New York appellate court affirmed the trial court's holding that an email exchange effectively amended an employment agreement. The plaintiff served as the CEO of the defendant's American subsidiary. Following the onset of financial problems in the American company, the plaintiff was removed as CEO and given a number of options. In an email from the then-chairman of the defendant's American subsidiary, the plaintiff received a proposal whereby the plaintiff could remain at the company if he spent 70% of his time developing new business and the remainder managing business operations and cultivating former clients. In his reply to the chairman's emailed proposal, plaintiff stated the following: "I accept your proposal with total enthusiasm and excitement ...". Each party typed his name at the foot of each email message.

The trial court held that the plaintiff and the chairman had agreed in writing to modify the plaintiff's duties under his employment agreement via the series of exchanged emails. Furthermore, such emails constituted "signed writings" within the Statute of Frauds because the name at the end of each message signaled the author's "intent to authenticate" its contents. The provision in the employment agreement requiring a "signed writing" signed by all the parties was satisfied by the sender's name being written at the end of each email. Although New York's electronic signature law is not specifically referenced, it is clear that both the trial and the appellate courts found the electronic signatures and emails to be legally effective in amending the written employment agreement.

Sims v. Stapleton Realty, Ltd., 2007 Wisc. App. LEXIS 741 (August 23, 2007). ESIGN Take-aways:

- Under Wisconsin UETA, an agreement originally in paper form can be amended by a party using email.

In Sims v. Stapleton Realty, Ltd., 2007 Wisc. App. LEXIS 741 (August 23, 2007), the Court of Appeals of Wisconsin found that the parties had effectively amended a real estate listing contract by email. The Sims had entered into a listing contract with Stapleton Realty, Ltd. ("Stapleton") whereby the parties agreed that a 5% commission would be earned by Stapleton if during the term of the contract the "seller sells or accepts an offer for the sale of the property or a purchaser is procured 'at the price and on the same terms set forth in this Listing and in the standard provisions of the current WB-11 residential offer to purchase form even if Seller does not accept this purchaser's offer.'" Seven days prior to the end of the contract term, the seller received an offer that was equal to \$14,000 less than the list price. The seller countered with contractual changes and a price that was equal to \$7,000 less than the list price. The buyer then accepted some of the contractual changes,

ELECTRONIC SIGNATURE CASES CONTINUED

but not all. The seller sent an email to Stapleton seeking to lower the commission to 4.25% so that he would net the same amount had the purchase price been equal to the list price. He indicated that he would accept the buyer's terms if the realtor would reduce the commission. In a number of emails exchanged with the realtor, he criticized the realtor's performance, but also said "Yes, you found a potential buyer and are entitled to be compensated for that." This sentiment was repeated by Sims in another email sent the next day. After Sims and Stapleton signed an amendment changing the commission (but not term of the initial contract), the buyer withdrew her offer. Sims later contacted the buyer to indicate that he was willing to sell based on the terms of an earlier offer and the buyer accepted.

After the closing, although \$20,000 was paid to Stapleton as a commission, Sims later sought the return of the commission on the grounds that Stapleton had breached various duties in the listing contract and was not entitled to the commission since a buyer had not been procured prior to end of the contract term. Stapleton counterclaimed for payment of the full commission and asserted that the emails between the parties constituted a written document under Wisconsin's Uniform Electronic Transactions Act ("UETA") such that Sims had agreed that Stapleton was entitled to the commission for the buyer's offer. Because Sims' emails acknowledging Stapleton's right to receive a commission occurred after the term of the listing contract, the court found that "Sims, in a signed writing, extended the time period in the initial listing contract from May 31 to June 2, 2004." Furthermore, the offer accepted by Sims on June 15, 2004 "was precisely the one that was on the table when he wrote Stapleton that she was entitled to a commission[.]" Pursuant to these findings, the court found that the listing contract was not void and that Sims had waived the time restriction by email. Accordingly, the appellate court reversed and remanded the trial court with instructions that Sims' complaint seeking the return of \$20,000 be dismissed and that a judgment in favor of Stapleton for the remaining commission be entered.

Shroyer v. New Cingular Wireless Services, Inc., 2007 U.S. App. LEXIS 1950 (9th Cir. Aug. 17, 2007). E-SIGN Take-aways:

- Although a valid electronic signature can be created over the phone using an IVR process, contract principles (such as unconscionability) can render an electronic contract unenforceable.

Evidencing increasing acceptance of electronic signatures by Federal courts, the Ninth Circuit in Shroyer v. New Cingular Wireless Services, Inc., 2007 U.S. App. LEXIS 1950 (9th Cir. Aug. 17, 2007), held that a class arbitration waiver contained in New Cingular Wireless Service Inc.'s standard contract for phone services effectively agreed to over the phone using an IVR process was unconscionable and unenforceable. Although the court found that the plaintiff consumers had effectively executed the agreements using an electronic signature over the telephone, applicable contract law rendered such agreements unenforceable.

ELECTRONIC SIGNATURE CASES CONTINUED

This case arose following the 2004 merger of AT&T Corp. (“AT&T”) and Cingular Wireless, LLC that created the new New Cingular Wireless Services, Inc. (“Cingular”). In this class action, the plaintiffs alleged that service deteriorated significantly following the merger. Shroyer, in particular, complained about his service and, upon receipt of his complaint, AT&T informed him that his service would improve if he signed a new contract with Cingular. Following such advice, Shroyer transferred his 2 cellular phone service accounts from AT&T to Cingular on January 2, 2005 by entering into new agreements with Cingular over the telephone. Similar to the other class members, Shroyer “executed an electronic signature over the telephone to assent to the terms” of the Cingular agreements. Specifically, Shroyer, and the other class members, “selected the answer ‘Yes’ in response to the statement ‘You agree to the terms as stated in the Wireless Service Agreement and terms of service.’”

The form contract to which Shroyer signed and agreed to over the telephone was an agreement that incorporated Cingular’s Terms and Conditions Booklet by reference. By agreeing to the terms of the agreement, the plaintiffs purportedly agreed to be bound by the binding arbitration clause contained in the booklet. Such arbitration clause also contained a class action waiver. Pursuant to such clause, the district court granted Cingular’s motion to compel arbitration and dismiss the action with prejudice. The Ninth Circuit, however, reversed and found that under California law the class arbitration waiver at issue was both procedurally and substantively unconscionable and unenforceable under the test set forth in Discover Bank v. Superior Court of Los Angeles, 36 Cal 4th 148 (Cal. 2005). As in Discover, Cingular’s contract was both a consumer contract and a contract of adhesion. Furthermore, the invalidation of such contract was not preempted by the Federal Arbitration Act.

Labajo v. Best Buy Stores, et al., 2007 U.S. Dist. LEXIS 21868 (S.D.N.Y. March 15, 2007). E-SIGN Take-aways:

- An effective electronic signature process must be able to reliably recreate what the signatory agreed to when the signature was provided in order to prove what was agreed to by the signatory.

Plaintiff (Christina Labajo) brought a class action lawsuit against Defendant (Best Buy Stores, Time Inc., et. al) on behalf of herself and all other consumers who were improperly charged for magazine subscriptions after purchasing merchandise at Best Buy stores.

On October 29, 2004, Plaintiff purchased certain merchandise from Best Buy with her debit card and was told by the clerk she was eligible for a free magazine subscription. Plaintiff accepted the offer, signed a computer pad at the register to complete the transaction and received the free issues. The subscription was automatically renewed and Plaintiff’s debit card was charged three times for a total of \$70.50. Neither the computer pad nor the store clerk informed the Plaintiff that she would be charged after eight issues unless she cancelled the subscription. The receipt, however, contained the following language:

ELECTRONIC SIGNATURE CASES CONTINUED

I authorize Best Buy to give my credit or debit card to SI and SI to charge my card for the initial and six month renewal terms . . . NO RISK: If within 8 issues you do not want the magazine, simply call Sports Illustrated at 1-800-284-8800 or go online to: www.sicustomerservice.com and you will NOT be charged.

In the bag containing the purchased merchandise, Plaintiff was also provided with a brochure describing the offer terms.

Defendant also alleged that the electronic signature pad used by Plaintiff to complete the transaction notified the Plaintiff of the terms of the promotion, but this claim was disputed by the Plaintiff. Defendant alleged that the electronic signature pad contained the following language: “Yes! Sign me up for Sports Illustrated’s issue trial offer with automatic renewal. I authorize Best Buy to give my credit or debit card to SI and SI to charge my card for the initial and six month renewal terms.” The Defendant, however, did not produce evidence showing Plaintiff’s signature created by the signature pad on the same document with such authorizing language.

After Plaintiff’s bank account was debited twice, Plaintiff contacted Defendant to cancel the subscription. Although Defendant’s representative agreed to do so, Plaintiff’s account was charged a third time. Plaintiff repeatedly requested a refund from Defendant, but no refund was given.

The court dismissed the Plaintiff’s claims for negligence, breach of warranty and unfair competition, but allowed the Plaintiff to proceed with her claims for breach of contract and unjust enrichment. In refusing to grant Defendant’s motion for summary judgment with respect to Plaintiff’s claim for breach of contract, the court noted that further evidence was required to determine whether Plaintiff signed the signature pad containing the promotion disclosure. The primary issue with respect to this claim relates not to whether an electronic signature could be valid, but whether Plaintiff signed the electronic signature pad containing the disclosure and whether Plaintiff received information about the terms of the agreement prior to signing the alleged agreement.

Kloian v. Domino’s Pizza, LLC, 733 N.W.2d 766 (Mich. App. Dec. 28, 2006). E-SIGN Take-aways:

- Under Michigan UETA, two parties can reach a legally binding agreement using email.
- If a law other than an electronic signature law requires extra steps for an electronic record or electronic signature to be effective (such as a certain placement of a signature or method of delivery), that other law must also be complied with.

In Kloian v. Domino’s Pizza, LLC, 733 N.W.2d 766 (Mich. App. Dec. 28, 2006), the Court of Appeals of Michigan affirmed the lower court’s finding that the parties’

ELECTRONIC SIGNATURE CASES CONTINUED

attorneys had reached an enforceable settlement agreement through a series of email exchanges. The plaintiff in this case was a landlord who sued his tenant for owed rent, holdover rent, taxes, insurance, and other amounts. Before the scheduled trial date, the defendant's attorney sent an email to the plaintiff's attorney with an offer of settlement whereby the defendant would pay \$48,000 in exchange for a release of all of plaintiff's claims. In response, the plaintiff's attorney replied as follows: "I confirmed with Mr. Kloian that he will accept the payment of \$48,000 in [ex]change for a dismissal with prejudice of all claims and a release as [sic, of] all possible claims." Subsequently, defendant's attorney responded "Domino's accepts your offer ...". The attorneys then exchanged settlement documents by email. The plaintiff's attorney found the documents to be in order, but asked for a mutual release of claims. In response, the defendant's attorney responded by email that he had the check and his client's agreement to a mutual release, but needed to further revise the documents to accommodate the plaintiff's attorney's request. Subsequently, defendant moved to enforce the settlement agreement, but plaintiff refused to sign the settlement agreement. The trial court found the parties had entered into a binding settlement agreement during the email exchanges between the attorneys when defendant's attorney stated that "Domino's accepts your offer..."

On appeal, plaintiff asserted that the parties had not reached an agreement on essential terms, but the appellate court disagreed. As attorneys have the authority to settle a lawsuit on behalf of their clients, the court found that the plaintiff's email to the defendant constituted a valid settlement offer and defendant's email response was an acceptance of such offer because "defendant expressed the intent to be bound by plaintiff's offer and all the legal consequences flowing from the offer." The court further found a clear meeting of the minds on the essential terms of the agreement between the parties.

Plaintiff further asserted that the settlement agreement did not comply with Michigan law, the relevant statute being in the nature of a statute of frauds. Specifically MCR § 2.507(G) requires "an agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is ***in writing, subscribed by the party whom the agreement is offered or by that party's attorney.***" [emphasis added.] The court noted that "subscribed" was not defined by the relevant statute, but the dictionary defined it to mean "to append, as one's signature, at the bottom of a document or the like; sign." Although Michigan's Uniform Electronic Transactions Act ("UETA") clearly permitted the use of an electronic signature when applicable law required a signature, the relevant statute in this case required a "writing, subscribed," which the court found must be treated differently from a signature. Subsequently, the appellate court found the original settlement agreement to be enforceable since both attorneys typed, or appended, their names at the bottom of their email messages. However, since the plaintiff's attorney, when requesting a mutual release by email, did not similarly type his name at the bottom of the email, but only had his name at the top of the email, the modification to the settlement agreement was not enforceable

ELECTRONIC SIGNATURE CASES CONTINUED

because it did not satisfy MCR § 2.507(G) as he had not subscribed his name at the bottom of the email.

Verizon Communications, Inc. v. Christopher G. Pizzirani, 2006 U.S. Dist. LEXIS 81688 (E.D. Pa. Nov. 7, 2006). ESIGN Take-aways:

- Under New York law, an employee can be effectively bound by restrictive covenants delivered via email by the employer.

Plaintiff (Verizon) sued Defendant (Pizzirani), a former employee seeking enforcement of a 12-month non-competition restriction covenant that was contained in award agreements delivered to Defendant by email. Defendant was a highly compensated executive in Plaintiff's broadband division who sought to leave his job and work for Comcast.

Defendant was a recipient of Verizon's Award Agreements. The terms of such employee incentives were revised in 2005 to contain a non-competition restrictive covenant that prohibited Defendant for a period of 12 months after the termination of his employment from engaging in competitive activities as defined in such agreements. In early 2005 and 2006, Defendant received emails from Verizon's human resources department advising him in bolded language:

As you access your award online, it is important that you read and understand the terms and conditions of the Award Agreements. When accepting your award on-line, you acknowledge that you have read both the award agreements and Plan document, including the terms [and] conditions regarding vesting, restrictive covenants and the provisions concerning award payouts.

On March 17, 2005, Defendant clicked on the "I ACKNOWLEDGE" button on the bottom of the email whereby he acknowledged that he understood that in accepting such award, he would be bound by the Award Agreements including their restrictive covenants. In 2006, however, Defendant did not click on the button, which resulted in human resources contacting Defendant about such failure. In response, Defendant drafted and sent the following email to an employee in the human resources department: "John I will read and agree to the terms and conditions of the award agreement and Plan documents." After such certification that he understood the terms of the awards, Defendant was able to access the agreement online. According to the court, Defendant, by using an online electronic review and acceptance process, "expressly accepted these covenants on multiple occasions." In his defense, Defendant did not contest that he had executed the Award Agreements by electronic signature, but instead claimed that he did not read the contracts prior to electronically signing them and asserted that he was completely unaware of the restrictive covenants until October 2006.

ELECTRONIC SIGNATURE CASES CONTINUED

In a decision governed by New York law, the district court held that the non-compete provision was enforceable and that the Defendant could not accept the offer of employment from Comcast. The court noted that under “New York law, a valid contract is formed by manifestation of assent, including checking a box or clicking a button on a computer screen[.]” Furthermore, New York case law holds that the parties are bound by contracts they sign regardless of whether the party reads the contract so long as the other party does not commit fraud, duress or some other wrongful act. Defendant claims that Verizon failed to notify him that they had revised the Award Agreements to include a non-competition clause. The court, however, held that the Defendant had a reasonable opportunity to know the essential terms and character of the agreements, Verizon encouraged Defendant to read them and that Defendant was adequately warned by email that, through his acceptance, Defendant certified that he had read and agreed to be bound by the agreements and their restrictive covenants. Lastly, in order to execute the agreements on his computer, Defendant was required to click on a box on his computer screen acknowledging that he had read and understood the documents.

As further evidence in Verizon’s favor, the court found it compelling that the Defendant was under no time pressure to read and sign the agreements because he had more than a month to read and electronically sign the documents. The Defendant complained that he was only able to view the document in a small box on the computer screen, but Verizon demonstrated that Defendant had the ability to print the agreements, save them to his hard drive or expand the default size viewing screen. The Defendant also had a personal incentive to read the agreements as they represented hundreds of thousands of dollars of additional compensation for him. Because Verizon went to great lengths to ensure that its employees understood the importance of reading the documents, the court found little evidence that Verizon intended to misrepresent the terms of the Award Agreements. The Defendant, however, made direct misrepresentations by certifying that he had read and understood the Award Agreements when he had in fact done neither.

Bell v. Hollywood Entertainment Corporation, 2006 Ohio App. LEXIS 3950 (Aug. 3, 2006). E-SIGN Take-aways:

- Under Ohio law, an employee can be effectively bound by an arbitration provision contained in an electronic job application.

Plaintiff (Bell) sued Defendant (Hollywood) for hostile work environment, sexual harassment and civil battery. In the employment application process, Plaintiff completed her application electronically. As a condition to her employment, she was required to submit all claims to arbitration. The electronic application process could be done at a kiosk or over the Internet through the Defendant’s website. The court found that the Plaintiff had agreed to arbitration because she received the information about arbitration and evidenced that she read and understood such terms.

ELECTRONIC SIGNATURE CASES CONTINUED

Specifically, in the electronic application, Plaintiff was informed of the arbitration requirement because the application posed a series of questions regarding arbitration. “After initial disclosures and consents required by the Electronic Signature in Global and National Commerce Act ... and the Fair Credit Reporting Act,” Plaintiff was presented with a screen that informed her that all claims would be submitted to arbitration pursuant to Defendant’s Employment Issue Resolution Program (“EIRP”). If Plaintiff wanted to read a summary of the EIRP Rules or wanted to review an entire copy of the rules, Plaintiff was directed to access another website link. The screen required Plaintiff to either acknowledge or deny that she knew how to access such link. The next screen asked Plaintiff whether she agreed to arbitrate any and all disputes with Defendant and she was required to choose “yes” or “no.” Because the Plaintiff selected “yes,” the court found that the Plaintiff confirmed her agreement to arbitrate any employment-related disputes. Further, Plaintiff confirmed that she knew how to access the Defendant’s website to obtain the complete arbitration policy (even though there was no apparent evidence she actually reviewed such policy).

According to the court, “Federal and Ohio law both authorize the use of electronic signatures and deem such signatures binding.” Quoting *Campbell v. General Dynamics*, the court noted that a “signature may not be denied legal effect or enforceability solely because it is in electronic form ... [and a] contract may not be denied legal effect or enforceability because an electronic record was used in its formation.” Further, the court stated that “[w]hether she read the paperwork or disregarded the paperwork, she signed the papers stating that she agreed to the terms of the EIRP in order to be hired.” The court affirmed the lower court’s decision to compel arbitration because Plaintiff “had the legal capacity to contract, signed the agreement and was sufficiently informed regarding the program. She was informed on how to obtain additional information, confirmed that she understood how to obtain additional information, and knowingly and voluntarily consented to arbitrate her employment claims against” Defendant.

Wike v. Vertrue, Inc., 2007 U.S. Dist. LEXIS 19843 (M. D. Tenn. March 20, 2007) – Plaintiff (Margaret Wike) brought a class action suit on behalf of herself and other similarly situated persons allegedly harmed by the “unlawful and deceptive ‘membership billing’ practices” of Defendant (Vertrue, Inc.). Defendant’s business involved the sale of over twenty membership programs ranging in price from approximately \$169.95 to \$199.95 that purportedly gave “consumers exclusive, members-only access to discounts on various consumer goods and services.” However, the same discounts are widely available to the public free of charge through unsolicited direct mailings, periodicals, local retailers, the Internet and newspapers. Among other deceptive practices, Defendant’s representatives allegedly used various methods to disregard or obstruct customers’ attempts to contact Defendant, cancel memberships and remove unauthorized or questionable charges from their credit card bills and bank accounts. Furthermore, Defendant frequently marketed its membership programs under the name of a non-affiliated partner, but would not include the partner’s name or membership fulfillment materials or billing statements, which would cause confusion as to the actual source of the membership and nature of subsequent charges.

ELECTRONIC SIGNATURE CASES CONTINUED

In the case at hand, Plaintiff noticed unauthorized charges on her bank statement and contacted Defendant repeatedly to cancel her membership. Defendant repeatedly refused to comply and continued to charge Plaintiff's account. Once Plaintiff filed the lawsuit, however, Defendant fully credited Plaintiff's accounts for all of the unauthorized charges.

Defendant presented evidence that Plaintiff purchased two of its membership programs. In her first purchase, Plaintiff clicked on a banner on an AOL website, which then directed Plaintiff to one of Defendant's websites where Plaintiff purchased the program by providing her MasterCard number. Defendant alleged that Plaintiff purchased a second program by placing a telephone call to AOL, who then transferred her to a marketing company retained by Defendant after Plaintiff expressed interest in Defendant's program. Plaintiff's acceptance of Defendant's membership, which included a free \$50 Wal-Mart gift card, was captured on audiotape, a written transcript of which was provided to the court by Defendant. As explained to Plaintiff on the phone, Plaintiff's Visa card would be charged regularly for the second program. Plaintiff countered that she did not agree to purchase such membership program and that she had called AOL for technical assistance and was offered the gift card as gratitude for her patience. Plaintiff alleged that the entire call with the marketer was not recorded intentionally. Plaintiff later discovered an unauthorized charge on her bank statement and called the phone number related to such charge to request a refund.

The Plaintiff made a claim under both the Tennessee Consumer Protection Act and Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq. ("EFTA"), alleging Defendant made unauthorized electronic fund transfers in connection with purchase of Plaintiff's membership program. EFTA was deemed to apply because Plaintiff's Visa card was a debit card through which electronic fund transfers covered by EFTA occurred. Defendant claimed the charges were "preauthorized electronic fund transfers" authorized by Plaintiff with an electronic signature in a recorded phone conversation under ESIGN, which satisfied EFTA's requirement for a written authorization. The court, however, denied Defendant's motion for summary judgment. In its ruling, the court held that the "incomplete and disputed factual record does not permit the Court to rule on these intricate legal questions at the present time."

In Campbell v. General Dynamics Government Systems Corporation, 2005 U.S. App. LEXIS 9360 (1st Cir. May 23, 2005) ("General Dynamics"), the U.S. First Circuit Court of Appeals refused to enforce an employer's arbitration policy. In this case, the employer sent an email to all of its employees to announce a change in policy such that all workplace disputes would be subject to arbitration. The actual policy and the revised employee handbook could be examined by the employees by accessing links at the bottom of the email.

The General Dynamics court held that the employer's email did not constitute sufficient notice to the plaintiff that his continued employment would constitute a waiver of his right to access a judicial forum. The court found the employer's

ELECTRONIC SIGNATURE CASES CONTINUED

notice insufficient for a number of reasons. First, the employer failed to elicit a response or acknowledgment from its employees that he or she had read the email by requiring the employees to acknowledge receipt or to click a box on a computer screen. Second, the employer did not follow its typical procedure used to communicate to its employees regarding significant changes in the terms of their employment by memorializing such significant changes in writing, requiring the employee's "wet ink" signature and placing the signed writing in the employee's personnel folder. The substance of the email also failed to state directly that the policy contained an arbitration provision that would waive the employee's right to a judicial forum and failed to place the employee on inquiry notice that the policy had contractual significance. Consequently, "a reasonable employee could read the email announcement and conclude that the Policy presented an optional alternative to litigation rather than a mandatory replacement for it." Delivering a clear and explicit message in contractual language to employees will greatly assist an employer in demonstrating that its employees had notice of such a policy. The lesson of General Dynamics is that because of ESIGN, an "email, properly couched, can be an appropriate medium for forming an arbitration agreement."

* * * * *

About the Authors

Amanda M. Witt and Jon Neiditz are attorneys in the Information Management Practice of Nelson Mullins Riley & Scarborough LLP. Their practice is focused on assisting clients to meet the legal and technological challenges of electronically stored information -- including managing risks and costs of e-discovery, developing and implementing records management programs when much business-critical information is in electronic communications, and preventing information leakage and privacy issues. They regularly assist clients move from paper to electronic documents and records. Their success in this area is based on (i) their familiarity with substantive law governing enforceable e-transactions and records, such as state UETA and federal ESIGN, as well as more specific law applicable to specific transactions; (ii) their equal familiarity with current and future challenges to the admissibility of e-documents under rules of evidence; (iii) their experience in structuring both e-transactions and the maintenance of e-documents so as to achieve enforceability and admissibility; and (iv) their familiarity with the operational requirements of their clients' businesses.

Amanda M. Witt

Atlantic Station, 201 17th Street NW, Suite 1700
Atlanta, GA 30363
Tel: 404.322.6120 • Fax: 404.322.6352
www.nelsonmullins.com

Jon A. Neiditz

Atlantic Station, 201 17th Street NW, Suite 1700
Atlanta, GA 30363
Tel: 404.322.6139 • Fax: 404.322.6033
www.nelsonmullins.com

**Nelson
Mullins**