

Even An Unsigned Email Can Be A Legally Binding Contract

By Jonathan Jaffe, Daniel Whitmore, Kristin Rylko and Kevin McDonald

Law360, New York (August 7, 2017, 11:01 AM EDT) -- In a recent opinion, the Court of Appeals for the First District of Texas reversed a trial court and held that an email exchange constituted a signed legally enforceable contract.[1] The case involved a commercial dispute between the appellee, Prentis Tomlinson, the president and CEO of PetroGulf Ltd., and the appellant, John Khoury, an investor.



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PetroGulf was formed in 2008 to trade fuel oil and crude oil from Iraq. In late 2008, the parties met, Tomlinson presented Khoury with a prospectus for the newly formed company and told Khoury that PetroGulf had entered into contracts for the purchase and export of oil from Iraq to Iraqi Kurdistan and Syria. Following the meeting, Khoury invested \$400,000 in the company.[2]



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A few years later, however, Khoury was dissatisfied with his investment and the lack of transparency with the company's financials. He met Tomlinson in 2012, and during the meeting Tomlinson agreed to repay Khoury the amount he loaned to PetroGulf. They agreed that, at Tomlinson's election, the debt would be repaid over four or five years.

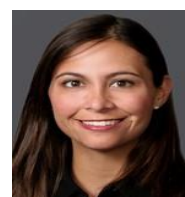
A week later, Khoury sent the following email to Tomlinson:

On Jan 16, 2012, at 3:47 PM, "john khoury" <[email address redacted by court]> wrote:

Prentiss,

To recap our meeting in Houston on Monday January 9, 2012, I would offer the following recap:

1. You confirmed your intention to repay the \$400,000 loan I made to Petrogulf, as provided for in the documents, and for which I requested, as provided for, almost 2 years ago.
2. Eddie Moses had confirmed this to me in 2011, at a luncheon, at Babin's restaurant, approximately 6 months ago.
3. You were going to make the January interest payment, as per the original schedule, when you returned to Washington, D.C.
4. I agreed to reduce the interest from 14% to 7.5% on a 4 or 5 year payout. Four years P&I payments at \$9,671.56, or 5 year P&I payments of \$8,015.18.
5. You were also going to redo the books and records, to more accurately reflect the last 4 years for Petro-Gulf.



Kristin Rylko



Kevin McDonald

Please confirm this agreement. Also, please make the regular payment for January[.]
Thank You for honoring your word. It is refreshing to know that you and I both respect this principle.
Best Regards,
John Khoury.

Tomlinson sent the following response by email:

Subject: Re: agreement
From: Prentis Tomlinson ([email address redacted by court])
To: ([email address redacted by court])
Date: Monday, January 16, 2012 8:32 AM
We are in agreement and I am working on producing the financial documents you requested. My goal is to have completed by weeks end and forward to you.

When the debt was not repaid, Khoury brought suit in Texas state court alleging breach of contract, securities violations and common law fraud. The jury found in Khoury's favor on all three claims.

After the trial, Tomlinson filed a motion for judgment notwithstanding the verdict, arguing that the contract was not enforceable under the Texas Statute of Frauds because the writing evidencing the agreement — the email — was unsigned. Tomlinson acknowledged that under the Statute of Frauds, his email constituted a written document so that point was not at issue. The trial court granted the motion for the securities act claim and the breach of contract claim. Khoury appealed.

The legal status of the email correspondence is governed by the Texas Uniform Electronic Transactions Act (UETA).[3] UETA is grounded in three principles:

1. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
2. If a law requires a record to be in writing, an electronic record satisfies the law; and
3. If a law requires a signature, an electronic signature satisfies the law.

Under UETA, a "record" is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." This definition incorporates traditional writings, tape recordings and information stored on hard drives or CD-ROMs.

An "electronic record" is "a record created, generated, sent, communicated, received, or stored by electronic means." The term is broad-ranging and encompasses records created or stored on a computer or any type of media.

An "electronic signature" is defined as an "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." This defined term extends to a typed name at the end of an email, a PDF of a handwritten signature attached to an electronic document, a click-through for a software program (for example, an "I Agree" button), a PIN number or other password, a retinal scan, a fingerprint, a digitized picture of a handwritten signature, and an encrypted authentication system.[4]

Tomlinson's name was not typed at the end of the email. Nor was there a signature block at the end of

the message. The question for the court was whether the name or email address in the “From:” field in the header of the email constituted an electronic signature.

Reviewing UETA’s definition of an electronic record, the court stated that a name or email address in a “from” field is a symbol logically associated with the email. Moreover, the “from” field identifies the email’s sender and authenticates the email as the act of the sender.

In conclusion, the court held that the evidence was sufficient to establish that Tomlinson signed the email and that the signed email satisfied the Statute of Frauds. The court’s broad view of electronic signatures is consistent with the intent of UETA, which provides for an expansive definition of what constitutes an electronic signature.

In light of the Texas appellate court ruling in *Khoury* and similar rulings in other courts,[5] certain types of practice guidelines are recommended to mitigate the risk that an email exchange may inadvertently form an enforceable contact.

For example, an email disclaimer may be included that states that nothing in the email is intended to constitute an electronic signature under the federal Electronic Signatures in Global and National Commerce Act (ESIGN) as well as the relevant state statute unless otherwise clearly stated in the body of the email. Another disclaimer may state that the relevant party is not legally bound until a definitive physical contract is executed by the counterparties.

Parties negotiating contractual terms by email should generally avoid making unconditional statements. And classic contractual terms such as “offer,” “acceptance” and “agreement” should be used with care lest an offeror or offeree discover after the fact that an inadvertent contract has been formed.

Of course, appropriate training for sales people and others who might be involved in the contracting process to avoid inadvertent contracts will further mitigate the risk.

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[1] *Khoury v. Tomlinson*, 518 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.).

[2] Brief for Plaintiff, *Khoury v. PBT Capital Partners LLC*, No. 201201491, 2012 WL 5350314 (Tex. Dist. Oct. 17, 2012).

[3] The Uniform Law Commission drafted the model form of the Uniform Electronic Transaction Act. The model legislation has been adopted by 47 states, including Texas, as well as the District of Columbia, Puerto Rico and the US Virgin Islands. Illinois, New York and Washington have their own alternative statutes addressing electronic transactions.

[4] Jeremiah S. Buckley, Margo H.K. Tank, R. David Whitaker & John P. Kromer, *The Law of Electronic Signatures and Records* 38 and 89 (2017 ed.).

[5] See *Int'l Casings Grp., Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863, 873 (W.D. Mo. 2005) (holding sender's email address in the "From" section of an email constitutes the sender's electronic signature); *Dalos v. Novaheadinc*, No. 1 CA-CV 07-0459, 2008 WL 4182996, at *3 (Az. Ct. Ap. 2008) (holding sender's name in the "From" field acted as the sender's signature); and *Kluver v. PPL Mont., LLC*, 368 Mont. 101, 293 P.3d 817, 822–23 (2012) (holding sender's name in his email address in the "From" section of the email constitutes the sender's electronic signature).

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