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Putting e-signatures to work - by Jason Curtin

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Do you, your clients, or your employees use electronic signatures to execute real estate documents? If so, it is important to understand the meaning of “electronic signature,” or “e-signature,” to ensure your or your clients’ contracts are validly executed, or at least not executed before you or your clients intend. Here is a primer.

Under the federal Electronic Signatures in Global and National Commerce Act (ESIGN) and the subsequent Uniform Electronic Transactions Act (UETA), “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.” Items included range from faxed ink signatures to unique biometric identifiers, such as fingerprints.

The benefits of e-signatures are clear: convenience, speed, and reduced costs. Signatures can be faxed or e-mailed to close a deal rather than overnighted, which is a major reason why e-signatures are increasingly common.

Three standards must be met for an e-signature to be enforceable:

- (1) the signature is attached to or logically associated with an electronic record;
- (2) the signature is made with an intent to sign the record; and
- (3) the signature is attributed to the signer by showing that “it was the act of the person.”

Security procedures verifying either the identity of the signatory or the integrity of the record itself are helpful but not required for establishing attribution.

For deeds, mortgages, and certain other real estate documents to be effective, state laws require recording with a governmental office. As many governmental bodies continue to require paper instruments to include notarized, manual signatures, we recommend that clients adhere to this form of signature for recording purposes until electronic systems become more common.

Although e-signatures are sufficient for the creation of legally binding documents, attributing an e-signature is left open to other law and factual circumstances. For example, in litigation, if the authenticity of an e-signature is in dispute, those seeking enforcement must prove that the signature was made by the indicated party.

While ESIGN and UETA made e-signatures functionally equivalent to handwritten signatures, they are arguably more vulnerable to misappropriation. Parties relying on electronic signatures need to be satisfied that they are sufficiently verifiable. Use of digital authentication, including passwords and PINs, can increase your confidence in utilizing and accepting e-signatures in contract execution.

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