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Electronic signatures in real estate transactions - by Philip Hastings and Benjamin Lewis

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Real estate transactions are now done almost entirely through digital means. For speed, convenience and efficiency, purchase agreements and leases are usually exchanged and signed electronically. The typical “sit-down” closing is something of a relic, with closing documents often signed remotely. “DocuSign” is used as a verb and has been joined by a growing number of similar on-line platforms (such as DocHub, DotLoop, Eversign, HelloSign, PandaDoc, and SignRequest to name a few). During the COVID-19 pandemic, the use of electronic signatures became a practical necessity more than a convenience.

The law has facilitated this trend. Most states - including throughout New England – now have laws providing that a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in an electronic form or because an electronic signature was used in its formation. During COVID-19, additional legal steps were adopted to allow for documents to be notarized remotely.

Courts have enforced real estate contracts using digital means. For example, in one Massachusetts case, the buyer and seller of real estate agreed to communicate by email and settled on a purchase price and other essential terms via email exchange. Each email exchange concluded with the typewritten name of the person sending the email. When the seller attempted to back out of the deal, he was sued for breach of contract. The Court held the typewritten name at the end of the email amounted to a signature.

Yet, despite the numerous benefits and its wide acceptance, concerns remain, and several requirements must be met to give an electronically signed document legal effect. The parties must evidence an intent to sign electronically and consent to the use of digital signatures and be able to retain the electronically created record. Intent can be accomplished by using a mouse or touch screen to draw a signature or by clicking a button. The fundamental issue of whether a signature is effective remains a question of fact based on the surrounding circumstances.

Note, too, that the legal validity, court admissibility, and enforceability are all distinct concepts, with their own set of requirements. Electronic signatures are subject to legal challenges on the same grounds as traditionally executed documents, including forgery, fraud, mistake and duress, which may be introduced to rebut the validity of an electronic signature.

In addition, as with any communication over the internet, the exchange of electronic signatures is vulnerable to a cyberattack. It is prudent to manage risk and reduce exposure to hackers and cyber criminals. This may include virus protection and other systems to enhance cybersecurity and protect important data.

Finally, the ease of viewing and signing a document on a cell phone, computer or other hand-held device itself increases the risk of misunderstanding. While this may seem rudimentary, reviewing a document on a small screen is more difficult than reading a document in hand and can prevent a full and complete understanding of the terms. This, in combination with instantly and effortlessly clicking a mouse to execute a document, can potentially lead to disputes between parties to a transaction about the effectiveness of an electronically signed document. Having the parties acknowledge receipt of full copy of document, either by PDF or hard copy, prior to distribution for electronic signature can reduce this risk.

While cell phones and mouse clicks have largely replaced paper and pen in the world of real estate transactions, an electronic signature should still be given the same attention and significance as if signing in ink. And there are many important documents – deeds, wills, trusts, and powers of attorney – where an old fashioned “wet ink” signature remains either legally required or more appropriate than an electronic signature. Regardless of how a legal document is signed, having it reviewed by legal counsel in advance is strongly recommended.

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