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Electronic Transactions

When Email Becomes a Contract

by Judon Fambrough

David, a real estate broker, takes a listing on 34 acres of pasture land near Houston. One of the sellers, Tim, owns an additional, adjoining 3.78-acre tract he uses to stable his horses. It is not for sale.

Andy, a New Jersey resident, views the listing and contacts the broker. After several emails and phone calls, the buyer comes to Texas to view the property and signs an earnest money contract for the 34 acres with a 60-day closing. He learns of the additional 3.78 acres during the visit. Prior to closing, the title commitment reveals several oil and gas leases on the property. This concerns the buyer, and he seeks to lower the sales price.

Initially, the sellers balk but later renegotiate via multiple emails through their broker. During the renegotiations, Andy seeks to acquire the other 3.78-acre tract owned by Tim. The sellers counter with a two-year option to purchase the 3.78 acres (from Tim) at a stipulated price and a closing on the 34 acres within 24 hours at the initial contract price.

Andy accepts via email and wires the appropriate funds the same day. A few weeks later, he exercises the option to

purchase the 3.78 acres. Tim refuses, alleging, among other things, that such an agreement, if it exists, does not satisfy the statute of frauds. All enforceable real estate sale contracts must be placed in writing and signed by the person charged with the promise or agreement. Although Tim typed his name at the end of the emails, he never signed a formally written contract to this effect. He counters that the agreement was for a two-year right of first refusal, not a two-year option to purchase. Furthermore, the broker did not have the authority to accept the contract on Tim's behalf.

The buyer sues for specific performance.

Is Tim bound legally to the option contract? Specifically, did the parties' conduct satisfy the statute of frauds found in the Texas Business and Commerce Code (TBCC), Section 26.01(b)(4)?

Electronic Transactions Recognized

David and all real estate practitioners should be aware of the Uniform Electronic Transactions Act (UETA) found in Chapter 322 of the TBCC. The act received little attention when passed by the Texas Legislature in 2002. This law can significantly impact (positively or negatively) the way real estate professionals negotiate and consummate contracts.

Simply put, the UETA places electronic contracts and signatures on the same legal status as paper contracts with handwritten signatures as long as certain conditions are met.

The primary question is whether the UETA satisfies the statute of frauds. The answer lies among the various definitions of the act.

Terms Defined

According to the act, a *contract* means the total legal obligation resulting from the parties' agreement. An *agreement* is the bargain of the parties as found in their language or inferred from other circumstances.

The term *electronic contract* is not defined, but *electronic* is. It relates to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

The act defines an *electronic signature* 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*. The typing of a name at the bottom of an email could be recognized as an electronic signature according to this definition.

Encrypted signatures are not mentioned or required by the act, but certainly they can be used. Apparently, no encrypted signatures were used in the transaction just described. Encrypted or digital signatures are beyond the scope of this article. It is sufficient to say that unless a computer has the proper software installed, all signatures are unencrypted.

UETA states, "If a law (such as the statute of frauds) requires a signature, an electronic signature satisfies the law."

The statute refers frequently to a *record*. According to the act, a record means information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form. An electronic contract satisfies this definition.

The statute goes on to say, "If a law requires a record to be in writing (such as a written agreement or memorandum required by the statute of frauds), an electronic *record* satisfies the law." Clearly, UETA satisfies all the requirements of the statute of frauds.

No Formal Agreement Required

Based on the broad definitions of an electronic record and electronic signature, real estate contracts entered via email may be enforceable assuming one other condition is met.

The act applies only to transactions between parties who have agreed to conduct transactions by electronic means. Clearly, in this situation, the buyer and sellers did not agree formally to conduct an electronic transaction. However, the act goes on to say, "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct" (Section 322.005, TBCC).

Based on the broad definitions of an electronic record and electronic signature, real estate contracts entered via email may be enforceable assuming the parties have agreed to conduct transactions by electronic means.

Thus, the act requires no formal agreement. The agreement may be implied from the parties' conduct, among other things. The court makes this determination long after the communications cease. Consequently, unsuspecting buyers and sellers (or their brokers and agents) may be surprised to learn they have entered a binding contract before they know it. Resorting to traditional contract principles as a defense may be futile, as here.

Of course, these rules become a problem only when one of the parties wants out of the contract.

Security Procedures

The UETA appears to invite fraud by discounting the traditional pen-and-ink contracts. Anticipating the problems, drafters of the statute provided for the use of *security procedures*. These procedures verify that an electronic signature, record or performance is that of a specific person and detect changes or errors in the information in an electronic record. Security procedures include the use of algorithms or other codes, identifying words or numbers, encryptions, call-back or other acknowledgments.

Implementation of security procedures is left to the parties' discretion.

Resolving the Dispute

How would a court decide this case? The described facts are not hypothetical but based on an actual dispute, *Dittman v. Cerone,* decided by the Corpus Christi Court of Appeals in October 2013. Although the appellate court resolved several issues, here are the significant ones for real estate brokers and agents to consider.

First, the court aggregated three key emails to find a binding option contract. As the court pointed out, "Texas law, however, allows us to construe these email messages together to comprise one instrument. A court may determine, as a matter of law, that multiple documents comprise a written contract. It is well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent."

Second, the court found *this* "agreement to agree" enforceable. As a general rule, an agreement to make a future contract is unenforceable unless all the essential elements have been resolved. In this case, the three emails taken together settled all the essential terms of the option contract.

Third, the court concluded that defendants agreed to conduct the transaction electronically without a formal agreement. The statute addresses this issue in Section 322 of the TBCC, quoted earlier. The statute grants the court tremendous leeway in making this determination. Although this issue was a key element in the case, the court spent little time explaining how it reached its conclusion.

The court simply stated that all the emails sent by the defendants or through their broker had a signed (typed) name at the end. Based on the parties' conduct, the court ruled, "We hold that the evidence is legally sufficient to support a finding that the parties intended to conduct certain business electronically."

Fourth, the seller's broker possessed the authority to bind Tim to the option contract without any formal agreement to do so. Buyers, sellers and licensees should note that this authority may be implied from the parties' conduct.

Here, the facts show Tim (and wife) instructed the broker "… to tell the buyer that they would give him a two-year option contract to purchase the stable property." This email "was sent with their knowledge and consent, and that after they received a copy, they did not communicate either to the broker or the buyer that anything contained in that email was incorrect or that the broker was not authorized to send it."

Fifth, the parties entered an option contract, not a right of first refusal. Although this was not a major issue in the case, the court drew a distinction between the two. The distinction should be of interest to real estate practitioners.

"A right of first refusal, also known as a preemptive or preferential right, empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser. An option contract, on the other hand, is a privilege or right which the owner of the property gives another to buy certain property at a fixed priced within a certain time." Here, the buyer was given an offer via email to purchase the 3.78 acres at a fixed price for a specified period. It was an option contract, not a right of first refusal.

To learn more about rights of first refusal, see Center publication 1907, entitled "Dibs! Understanding the Right of First Refusal."

Sixth, the sellers committed fraud in the transaction. Fraud, according to the court, requires a material misrepresentation which was:

- false,
- either known to be false when made or was asserted without knowledge of its truth,
- intended to be acted on,
- relied upon and
- the cause of injury.

The appellate court affirmed the trial court's finding that when the sellers authorized their broker to offer the two-year option contract for the 3.78 acres in exchange for closing on the 34 acres within 24 hours at the original contract price, they

had no intention of fulfilling that agreement. This constituted actionable fraud.

It is unclear what penalties or sanctions were levied against the defendant (seller) for this fraudulent conduct.

Recommendations

Because the UETA is relatively new, buyers, sellers and real estate licensees need to be aware of its provisions and avoid unintended consequences. Upon taking a listing or becoming a buyer-broker, the issue of the possible effect of the UETA should be addressed. If the parties desire to conduct a transaction electronically, have them sign a document or send corresponding emails to this effect. Make sure both brokers receive copies. If they do not desire to conduct the transaction electronically, generate the same documentation to substantiate their intent.

Simply having the parties agree that the final contract must be placed on a TREC form and signed by both parties may, in itself, create problems according to Texas case law. Here is an excerpt on the topic from *Texas Jurisprudence III*.

"Whether correspondence showing that a written agreement is contemplated constitutes a contract itself or is simply preliminary negotiation to a contract depends on the parties' intent. Actions may manifest an intent to be bound by an agreement, even though the parties expressly provide that a formal contract will be executed in the future. Thus a letter agreement may be binding even though it refers to the drafting of a future, more formal agreement."

Here are some precautions that may be taken.

Advise your clients that offers and counteroffers transmitted via email or other forms of electronic communication, taken together as a whole, could be construed later as a binding contract. No formal, signed paper copy is required. To avoid this, instruct the client (or parties) to preface or end each communication with wording to the effect that the information is *not binding*. In the case of *Kelly v. Rio Grande Computerland Group (128 SW 3rd 759)*, the court said "A party not wishing to be prematurely bound by a letter agreement is advised to include a provision clearly stating that the letter is nonbinding…." The same applies to emails.

In addition, each communication may need to include a statement to the effect that an individual email alone cannot be integrated or consolidated with other correspondences to form a contract. Each email or communication must stand alone.

If the parties agree to conduct the transaction electronically, the broker's/agent's ability to bind their principals to the contract may need to be addressed. The parties may agree that any binding offer or acceptance must be communicated directly from one principal to the other. The broker/agent may transmit communications on behalf of the buyers or sellers during negotiations, but he or she cannot bind them to a contract as happened in this case.

Advise your clients that offers and counteroffers transmitted via email or other forms of electronic communication, taken together as a whole, could be construed later as a binding contract.

On a separate note, inform the parties that even though they agree to be bound to an electronic transaction, the lenders and title companies may insist on pen-and-ink signed contracts before issuing a title commitment or processing a loan application.

Even if the parties do not agree to be bound by electronic contracts and signatures, electronic communications may speed up negotiations and ultimately decrease the time needed to earn a commission.

This article is for information only. For specific legal advice, consult an attorney.

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THE TAKEAWAY

The Uniform Electronic Transactions Act gives electronic contracts and signatures the same legal status as paper contracts with handwritten signatures as long as certain conditions are met. A series of email messages combined may be construed as a contract in some cases by the courts.

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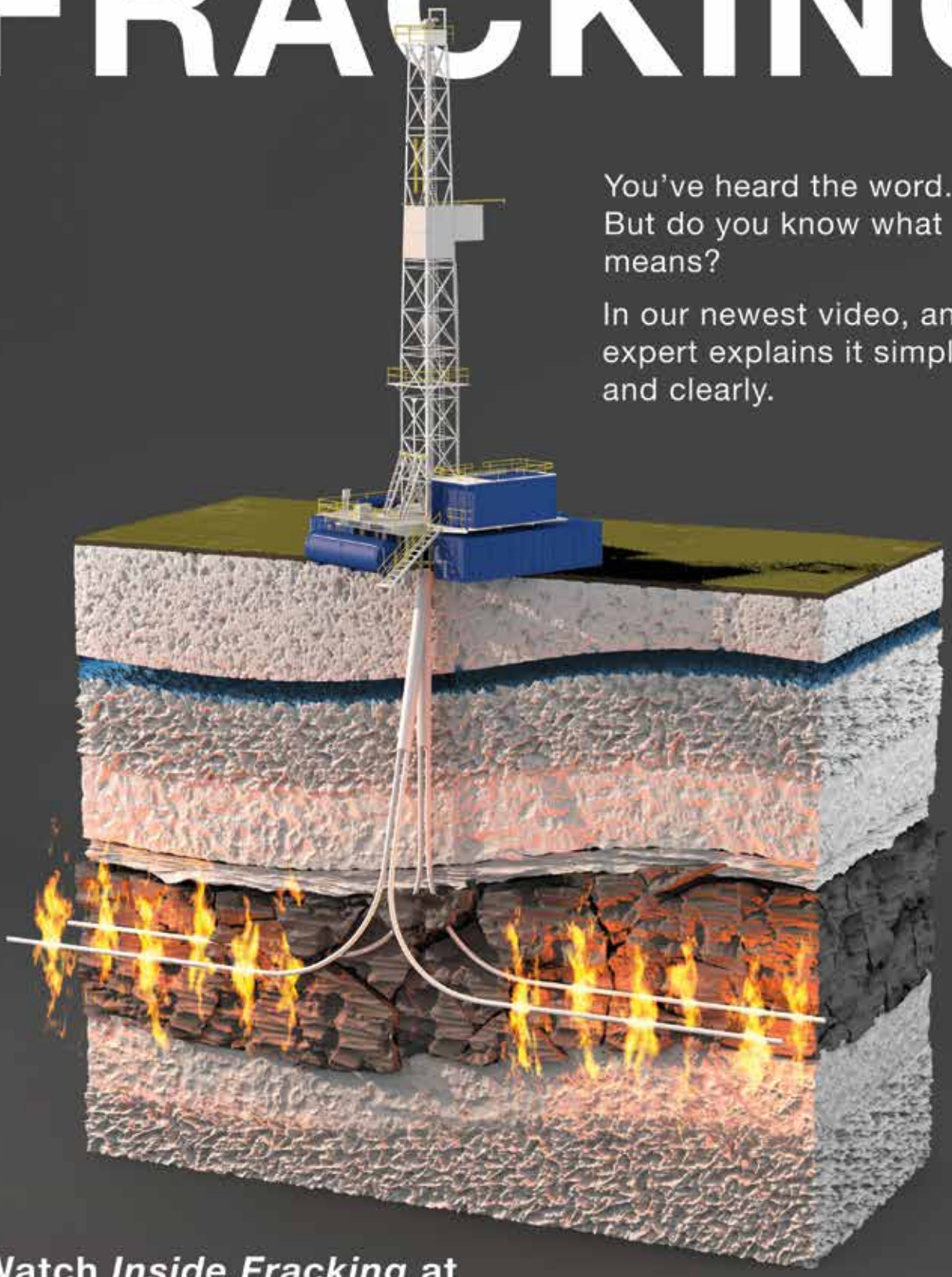

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