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## **Case Law on Electronic Signatures and the Enforceability of Electronic Transactions**

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### **Under New York law, a series of emails can effectively amend a written employment agreement**

*Stevens v. Publicis, S.A., 2008 NY Slip Op. 02880 (April 1, 2008).*

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.

### **Under Wisconsin's electronic signature law, an agreement originally in paper form can be amended by a party using email**

*Sims v. Stapleton Realty, Ltd., 2007 Wisc. App. LEXIS 741 (August 23, 2007).*

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, 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.

**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**

*Shroyer v. New Cingular Wireless Services, Inc., 2007 U.S. App. LEXIS 1950 (9th Cir. Aug. 17, 2007).*

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.

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.

**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**

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

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:

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](http://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.

### **Under Michigan's electronic signature law, two parties can reach a legally binding agreement using email**

*Kloian v. Domino's Pizza, LLC, 733 N.W.2d 766 (Mich. App. Dec. 28, 2006).*

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

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

*Verizon Communications, Inc. v. Christopher G. Pizzirani*, 2006 U.S. Dist. LEXIS 81688 (E.D. Pa. Nov. 7, 2006).

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.

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.

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

*Bell v. Hollywood Entertainment Corporation, 2006 Ohio App. LEXIS 3950 (Aug. 3, 2006).*

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.

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.

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 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 A. 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.

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