

REALTORS® LEGAL ALERT

ELECTRONIC SIGNATURES

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INTRODUCTION

For several years now, REALTORS® have been bombarded by pundits urging REALTORS® to enter the new age of electronic communications. Web sites, e-mails, and instant messaging have become as much a part of the REALTORS®' tool kit as MLS books and the telephone were several years ago.

Many REALTORS® have adapted their practices to the electronic age by using fax machines. Most REALTORS®, however, did not realize that the law, to a large extent, had not caught up to the electronic age and was not far advanced from the days of the quill pen and ink well.

This Legal Alert will discuss Connecticut law concerning signatures and legislative attempts to bring the law (albeit kicking and screaming) into the electronic age including the Electronic Records and Signature in Commerce Act and the Connecticut Uniform Electronic Transactions Act (“CUETA”).

CONNECTICUT LAW AND “WET” SIGNATURES

Connecticut courts have attempted to define a “signature” for many years. The last Connecticut Supreme Court case defining a signature occurred in 1975. In that case, the Court stated that “a

signature is the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions.” As you can see, the Connecticut courts traditionally favored a so-called “wet” signature, where the signer took pen in hand and signed his or her own name, made a mark or other distinguishing writing. Using such a definition, neither a faxed signature nor an electronic signature was valid.

Connecticut courts have not been entirely oblivious to technological change, however. Connecticut had several cases in the late 19th and early 20th centuries dealing with that technological revelation, the rubber stamp. In the rubber stamp cases, the courts dealt with the question as to the validity of signing a document by means of a rubber stamp. These cases are useful for two reasons. First, this is an instance where the Connecticut courts authorized use of something other than a true “wet” signature. Second, the courts engaged in a useful discussion as to the reasons for requiring a signature. Essentially, there are two reasons for requiring a signature. The first is that a signature shows that the person intended to be bound by what is written in the document. The second reason is that the signature shows that the document is the authentic document. It is useful to keep these concepts in mind as these concepts also carry over into the world of electronic signatures.

ENTER CONGRESS

Several states adopted legislation authorizing electronic signatures. This legislation varied, some were simply authorizing the electronic signature of documents and others specifying that certain technologies be used to produce an encrypted or secure signature. Congress began to get nervous over the various approaches that these states adopted. Believing that there should be one approach in use throughout the country and that this approach should not involve the adoption of any particular technology, Congress passed the Electronic Records and Signature in Commerce Act, also known as "E-sign." This Act preempts all state legislation to the contrary for contracts involving interstate commerce. Generally, real estate is so intertwined in interstate commerce that virtually all real estate transactions, especially those involving financing, are interstate commerce. Let us take a closer look at the Electronic Records and Signature in Commerce Act.

ELECTRONIC RECORDS AND SIGNATURE IN COMMERCE ACT

The Act applies to every sort of electronically transmitted signature. Therefore, it includes e-mails and facsimile transmissions commonly known as faxes. REALTORS®, therefore, have guidance from Congress as to how to obtain a signature on a document transmitted through a fax machine. The Act goes on to state that an electronically signed document is the equivalent of a written document with a so-called "wet" signature. This is so despite any requirement in state law that a document be in writing or be signed. As all REALTORS® will recall from their Principles and Practices course, a contract for the sale of real estate is not enforceable unless it is in writing. This is called the Statute of Frauds. As a result of this Act, the Statute of Frauds can be met electronically as well as with paper and ink. Similarly, Connecticut's statute requires that listing and buyer representation agreements be in writing and signed. The requirements for these agreements can also now be met electronically.

The Act is technology - neutral. An "electronic signature" is defined very broadly. It is an "electronic sound, symbol, or process, attached to or logically associated by a person with the intent to sign the record." In other words, it does not matter whether an encrypted signature is used or whether any encryption is used. So long as the parties are agreeable to contracting electronically and can agree on what constitutes a "signature," the use of that agreed upon signature will be adequate to properly execute the electronic document.

PROTECTION FOR CONSUMERS

Congress was also worried about consumers being forced to contract electronically or being put in a position where they were not able to send and receive electronic documents but were bound by the electronic documents. Therefore, Congress required that a notice be given to a consumer. A "consumer transaction" was defined as one for family or household purposes. The typical real estate transaction would, therefore, be a "consumer transaction" for purposes of the Act.

Consumers who are asked to contract electronically must be provided with a notice. As you might imagine, the notice must meet certain requirements. These are:

1. Consumers affirmatively consent to the use of electronic records;
2. Consumers receive a "clear and conspicuous" statement informing them of the right to receive records in paper or in non-electronic form, the right to withdraw consent regarding electronic transactions, and the process for requesting paper records;
3. Consumers receive a statement of the "hardware and software requirements" for access to and retention of electronic records; and
4. Consumers consent electronically in a manner that "reasonably demonstrates" that they can access the information.

As can be seen from this list, the statement that "the parties agree to be bound by their faxed signatures" contained in many Board and company listing

agreements, buyer representation agreements, and purchase contracts forms does not meet the Act's requirements for consumer transactions. *REALTORS® should therefore not rely on these statements for the fax execution of listing agreements, buyer representation agreements, and purchase contracts in residential transactions.* A form of notice that meets the Act's requirements is attached to this Legal Alert and can be found on CAR's Fax-On-Demand service at (800) 335-4862 or at www.ctrealtor.com. This addendum can be used in listing agreements and buyer representation agreements. It should also be noted that the CAR Purchase and Sale Agreement form incorporates the required notice and can be executed electronically.

**ENTER THE CONNECTICUT
LEGISLATURE**

Congress granted permission for a state to adopt its own electronic signature legislation. Any state that adopted the Uniform Electronic Transactions Act ("UETA") "substantially in its reported form" could do so without preemption by E-sign. Connecticut enacted Public Act 02-68 "An Act Concerning the Connecticut Uniform Electronic Transactions Act" in the 2002 session. The Connecticut version of the Uniform Electronic Transactions Act is known as "CUETA" and takes effect October 1, 2002. The Act applies to every transaction and contract except for wills and those documents that are recorded in the land records. The Act provides that an electronic record or electronic signature is attributable to a person if it was the act of the person. Whether an electronic record or electronic signature was the act of the person may be shown in any manner. In other words, evidence that a faxed signature bears a very great resemblance to the pen and ink signature of the person executing the document can be used to show that the faxed signature was the act of that person. This does not mean that the simple statement contained in board and company forms is sufficient to have a document executed by fax.

CUETA does answer certain questions that E-sign left unanswered. CUETA provides that an electronic record is "sent" when (a) it is addressed properly or otherwise directed properly to an information processing system that the recipient has

designated or uses for the purpose of receiving electronic records or information of the type sent; (b) from which the recipient is able to retrieve the electronic record; (c) is in a form capable of being processed by that information processing system; and (d) enters the information processing system outside the control of the sender. In other words, a fax is "sent" when you run it through the fax machine and it enters the telephone line with the proper phone number. An e-mail is sent once the "send" button is hit and the e-mail enters the telephone line. An electronic record is "received" when it enters the information processing system of the recipient or someone the recipient has designated or uses for the purpose of receiving electronic records. So a recipient who asked that the contract be faxed to an office supply center "receives" the document when the document reaches the office supply center's fax machine. However, if the sender is aware that the electronic record was not actually sent or received, the legal effect of the sending or receipt is determined by Connecticut law governing contracts in general or by the terms of the contract itself.

In addition, CUETA states that unless otherwise expressly provided for in the electronic record or agreed upon between the sender and recipient, the electronic record is deemed to be sent from the sender's "place of business" and to be received at the recipient's "place of business." If the sender or the recipient do not have a "place of business," then the sender or recipient's residence is considered to be the "place of business." Since the parties can establish the "place of business," it is possible to use a third party, like the parties' Realtor®, as the "place of business." However, this means that the Realtor®'s email or fax will continue to be used as the "place of business" unless the parties subsequently agree otherwise.

There are several items in CUETA that Realtors® should note. *First, the notices required by federal law for consumer transactions apply to residential real estate transactions.* Therefore, an electronic record, which includes a fax, should not be used in the purchase and sale of a residence unless the federal law's notice requirements are met. **Please note that under both CUETA and E-sign, a simple statement in a listing, buyer representation agreement or purchase and sale**

contract that the parties agree to be bound by their faxed signatures is insufficient to create a legally binding electronic signature. Further, in order to avoid arguments over the location of the recipient's "place of business" the electronic document should indicate where the electronic record is to be faxed or e-mailed and that is the only address or telephone number that should be used. Therefore, Realtors® electronically contracting should obtain the e-mail address or fax number where the consumer wishes to send and receive electronic documents to avoid questions over whether the consumer's residence or employer is the consumer's place of business. The CAR addendum for listings and buyer representation agreements meets the requirements of both E-sign and CUETA. The CAR form Purchase and Sale Contract also meets the requirements of both E-sign and CUETA.

ADVICE FOR REALTORS®

1. Remember that E-sign and CUETA apply to all forms of electronic contracting and electronic execution of documents including faxes, e-mails, instant messaging, and other forms of electronic communications.
2. Do not rely on statements in Board form and company form agreements stating "that the parties agree to be bound by their faxed signatures" for residential transactions. As a result of E-sign and CUETA, these statements do not meet the requirements to validate an electronic signature for a consumer transaction. Only those documents electronically executed using the proper notice mandated by E-sign and CUETA will be effective.
3. REALTORS® seeking to have documents electronically executed in foreign countries should be aware of the Acts in those countries and of the statutes in those countries concerning electronic execution of documents. They may or may not be the same as U.S. law.

SUMMARY

Congress and the Connecticut legislature have spoken on the electronic execution of documents and have established rules for the electronic execution of these documents. REALTORS® varying from these rules risk having consumers argue that their listing agreement, purchase and sale contract, or buyer representation agreement has not been properly executed and is therefore invalid. Since the rules are not particularly extensive or troublesome in order to execute documents electronically, REALTORS® should begin using the notice to ensure that there can be no claims that the required documents were not validly executed.

THIS LEGAL ALERT FOR REALTORS® IS INTENDED FOR GENERAL INFORMATION PURPOSES AND IS NOT INTENDED TO PROVIDE LEGAL ADVICE ON ANY SPECIFIC FACTS. IF YOU HAVE SPECIFIC QUESTIONS CONCERNING YOUR OWN SITUATION, PLEASE CONSULT YOUR ATTORNEY

ADDENDUM FOR USE OF ELECTRONIC SIGNATURE AND RECORD

This Addendum is used with one or more of the following documents (check all that apply):

Listing Agreement dated:

Buyer Representation Agreement dated:

You agree that we may use an electronic record, including fax or e-mail, to make and keep this Agreement.

You need not agree to use an electronic record. By a written notice to us, you have the right to withdraw your consent to have a record of this Agreement provided or made available to you in electronic form, but that does not permit you to withdraw your consent to the Agreement itself once it has been signed. We will provide you with a paper copy of this Agreement should you request one in writing to us at the address, e-mail or fax number listed below. Your agreement to use an electronic record applies only to this particular real estate transaction and not to all real estate transactions in which you are a party.

For access to and retention of faxed records, there are no special hardware or software requirements beyond access to a fax machine or fax modem and accompanying software connected to a personal or laptop computer. For access to and retention of e-mail records, you will need a personal or laptop computer, Internet account and e-mail software or web browser.

I wish to use (check one) Fax machine. My fax number is: _____
 E-mail. My e-mail address is: _____

All electronic records will be sent to the fax number or e-mail address noted above unless you inform us of any change in e-mail address or fax number in writing to the Brokerage Firm address, e-mail or fax number set forth.

Signature

Brokerage Firm

Print Name

Brokerage Firm address

Signature

Brokerage Firm e-mail

Print Name

Brokerage Firm fax number