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ARTICLE

RECENT CALIFORNIA DECISIONS REINFORCE NEED FOR CARE IN ELECTRONIC CONTRACTING

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I. INTRODUCTION

In mid-1999, the National Conference of Commissioners on Uniform State Laws, responding to an intensifying reliance on electronic communications and a corresponding need for clarity as to the legal enforceability of agreements reached electronically, approved and recommended for enactment in all states a Uniform Electronic Transaction Act ("UETA").[1] The California legislature then quickly adopted a modified version of this uniform act (as amended from time-to-time, the "Cal UETA"),[2] whereupon electronically created and/or executed contracts became, subject to certain exclusions, legally equivalent to written contracts.

In the years since this legal recognition of the general enforceability of electronic contracts, contracting through email and other electronic means has become commonplace in numerous industries, including in the real estate industry. However, the Cal UTEA does impose certain minimum standards that must be satisfied for an electronic record or signature to qualify for its protections. As businesses and individuals become more comfortable with the practice of electronic contracting, and improved technology and zeal for ever greater speed and efficiency in

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deal making accelerate reliance on the practice, more and more examples are arising of parties adopting lax standards with respect to the use of electronic records. Of particular concern are electronic signatures, which, when subjected to the scrutiny of the judicial process, are found insufficient under Cal UETA.[3]

This article discusses the primary requirements of the Cal UETA and highlights two recent California cases demonstrating their application.

II. OVERVIEW OF THE CAL UETA

A. General Rules Enabling Electronic Contracting

The Cal UETA, like the UETA, is a procedural statute that, rather than creating a separate regime of substantive contract law applicable only to electronic agreements, ensures that contracts effected electronically are functionally equivalent to and as enforceable as those consummated in writing. To that end, Section 1633.7 of the Cal UETA establishes the following four general rules governing the effect or enforceability of electronic signatures and records:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (d) If a law requires a signature, an electronic signature satisfies the law.[4]

These rules make clear that a specific record or signature cannot be denied legal effect solely because it is in an electronic form. This should not, however, be interpreted as meaning that any electronic record or signature is absolutely valid. Rather, it simply means that the electronic nature of a record or signature cannot alone be the basis for finding it to be invalid or unenforceable.[5] All electronic records or transactions conducted electronically must still satisfy the substantive requirements for contract formation applicable to transactions of the type in question under California statutory and case law, such as the requirements of offer and acceptance, consideration and meeting of the minds.

B. Specific Requirements Of The Cal UETA

There are three primary requirements that must be satisfied for an electronic record or signature to qualify for the protections of the Cal UETA: (i) the purported contract in question must not be one of the types of contract expressly excluded from the Cal UETA;[6] (ii) the parties to the purported contract must have agreed to conduct the subject transaction electronically;[7] and (iii) the symbols or markings on the purported contract seeking to be enforced as signatures must constitute electronic signatures as that term is defined in the CAL UETA[8]. Each of these requirements is discussed in further detail below.

1. Express Exclusions from Cal UETA

Civil Code Section 1633.3(c) expressly excludes more than sixty different types of contracts from the coverage of the Cal UETA. Most, but not all, of the excluded types of contracts relate to consumer transactions; the list includes, among others:

- wills, codicils or testamentary trusts;
- adoption, divorce and other family law matters;
- most uniform commercial code transactions;
- cancellations or terminations of health insurance or life insurance benefits; and
- notices of default, acceleration, foreclosure, or eviction.

This list is significantly broader than the comparable list of excluded contracts set forth in the model UETA and, according to some commentators, California's divergence from the model in this area demonstrates a belief that consumers engaged in the specific types of transactions in question are better protected by written contracts than by electronic contracts.[9]

2. Agreement to Contract Electronically

Pursuant to Civil Code Section 1633.5(b), Cal UETA "applies only to transactions between parties each of which has agreed to conduct the transaction by electronic means." If the parties to a purported contract have not agreed to conduct the subject transaction using electronic means, then Cal UETA will not apply.

While this is an essential requirement that must be satisfied for application of the Cal UETA, it is a fairly general requirement, and under the Cal UETA, as with the model UETA, the requisite agreement to

contract electronically can be implied based on "the context and surrounding circumstances, including the parties' conduct."[10] Thus, the necessary agreement could be established by the fact that the parties are in fact conducting the transaction in question electronically.[11]

Despite this general flexibility, however, the Cal UETA, in keeping with the trend of adopting additional layers of consumer protections, imposes certain additional limitations on consenting to contract electronically that are not found in the model UETA. Specifically, Civil Code Section 1633.5(b) states in relevant part that:

> [e]xcept for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.[12]

Thus, the necessary consent to transact electronically cannot be obtained by the inclusion of such a consent in a paper-based form contract, presumably because a consumer executing a written form contract would not anticipate such a document to contain such a consent.[13] Such a consent can be included in an electronic standard form contract, though the transaction contemplated therein cannot be conditioned on an agreement to conduct it electronically.

3. Electronic Signature Requirements

Under the Cal UETA, an electronic signature is: (a) "an electronic sound, symbol, or process (b) attached to or logically associated with an electronic record and (c) executed or adopted by a person with the intent to sign the electronic record."[14] Where these three elements are satisfied, the subject electronic signature is considered a legally enforceable equivalent of a handwritten signature.

The first of these elements, the requirement of a sound, symbol, or process, is intentionally broad and general in order to accommodate the many various methods and technologies one can use to sign elec-

tronically. These include a name typed at the end of an email, a digitized image of a handwritten signature that is attached to an electronic document, a unique passcode, pin number or other code that specifically identifies the individual user, a click of a mouse, such as on an "I accept" button online, and a particular sound, such as the sound made by pressing a particular key on a telephone.[15]

The second component of the definition requires that the electronic signature be attached to or logically associated with the electronic record in question, meaning that an electronic transaction must be implemented in a way that enables the parties to demonstrate that a specific signature was made with respect to a certain specific document. This is generally and most easily achieved by having the electronic signature incorporated into the actual stored document. However, this requirement could also be satisfied by a system in which the electronic signature is stored separately from the electronic record to which it is associated but in a way that allows the parties to reliably demonstrate that the two are correlated.[16]

The last requirement for creation of an electronic signature, an intent on the part of the signor to sign an electronic record, is often the most difficult for a party seeking to enforce a purported electronic signature to satisfy and is frequently a key issue in disputes regarding the enforceability of electronic records. This difficulty stems from the fact that, in order to satisfy this requirement, a proponent of an electronic signature must show both (i) that the sound, symbol or process was in fact made by the claimed signor, something that is referred to as authenticating the signature,[17] and (ii) that the signor, in making the subject sound, symbol or process, intended that act to constitute the signor's signature of the electronic record for purposes of creating and binding him or her to an enforceable agreement.[18] Guidance on both of these questions is provided in Civil Code Section 1633.9, which states that:

> (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
>
> (b) The effect of an electronic record or electronic signature attributable to a person under subdivision (a) is determined

> from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.[19]

The absence of an explicit agreement to conduct a transaction electronically is relevant but not determinative.[20]

III. RECENT CALIFORNIA CASES APPLYING THE CAL UETA REQUIREMENTS.

A. *J.B.B. Investment Partners, Ltd. v. Fair.*[21]

J.B.B. Investment Partners, Ltd., a case decided in December 2014, involved a dispute between the members of two limited liability companies formed to own and operate apartment communities in Arizona. After investing significant funds in the subject companies, the plaintiffs, a pair of real estate investors, allegedly uncovered various fraudulent misrepresentations and omissions on the part of the defendant, Thomas Fair, who was the managing member of the two companies. As part of the parties' efforts to negotiate a settlement of the dispute prior to litigation, on July 4, 2013, Giacomo Russo, one of the plaintiffs' attorneys, sent Fair an email setting forth the terms of a proposed settlement. That email proposed a settlement in the amount of $350,000 and stated, among other things, that "[a]ll litigation would be stayed pending the payments" to be made by Fair and that "[t]he Settlement paperwork would be drafted in parallel with your full disclosure of all documents and information required."[22] The email ended with a paragraph reading:

> We require a YES or NO on this proposal; you need to say 'I accept'…. Anything less shifts all focus to the litigation and to the Court Orders we will seek now as well as in the future as well as the subpoenas we will serve…It is now up to you to decide whether you would rather resolve this amicably or not. Let me know your decision.[23]

The July 4 email did not include a signature block or a signature line, nor did it include any signature by the Plaintiffs.[24]

The following day, Fair sent a reply to Russo's email from his cell phone which read: "[Russo], the facts will not in any way support the theory in your e-mail. I believe in Cameron. So I agree. Tom fair." Russo responded to this saying he did not understand Fair's email and asked for Fair to clarify whether he was accepting the terms of the July 4th email or not.

Then, just before noon on July 5, 2013 and before receiving a response from Fair to Russo's second email, the Plaintiffs filed a lawsuit against Fair and emailed him a copy of the filed complaint. During the following two hours, Fair sent multiple emails to Ansel Halliburton, one of Plaintiffs' other attorneys, repeating his agreement to the terms set forth in Russo's initial July 4th email and stating that "[y]ou should mot [sic] have filed. We clearly have an agreement."[25] On July 11, 2013, Halliburton sent a formal settlement agreement to Fair for his signature.

Fair did not sign the formal agreement Halliburton provided and on August 6, 2013 the Plaintiffs filed a motion pursuant to Code of Civil Procedure section 664.6 to enforce the settlement agreement.[26] The trial court granted that motion, having found that Plaintiffs had provided sufficient evidence to show that Fair deliberately typed his name at the end of his emails to the Plaintiffs' counsel and that that typed name constituted an electronic signature under the meaning of the Cal UETA and that the overall circumstances and conduct of the Parties' evidenced a meeting of the minds and an acceptance of the settlement offered in Russo's July 4th email.[27]

On appeal, the Court of Appeal highlighted the failure of the trial court and the plaintiffs' counsel to adequately consider any portion of the Cal UETA other than Civil Code Section 1633.7, and held that the facts did not support a finding that Fair's printed name at the end of his email constituted an electronic signature for purposes of the Cal UETA. Therefore, because a settlement agreement must be "signed by the parties" for it to be enforceable under Code of Civil Procedure section 664.6, the appellate court reversed the trial court's order enforcing the settlement agreement.[28] In reaching this decision, the Court of Appeal, unlike the trial court, closely examined the requirements of the Cal UETA, and determined that the facts failed to show either that the parties had agreed to conduct their settlement agreement using electronic means or that, in typing his name at the end of his emails, Fair intended to thereby sign and formalize an electronic transaction.[29]

As to the first of these requirements, the Court of Appeal noted that the July 4th offer email did not contain any statement indicating an agreement to enter electronically into a final settlement agreement, contained no signature blocks or the place for the parties to sign, and expressly stated that if Fair accepted its terms "[t]he Settlement paperwork would be drafted."[30] Based on these facts, the Court of Appeal found that nothing in the July 4th email indicated an agreement by the

parties that Fair's acceptance of the proposed settlement was an agreement to sign a legally binding settlement agreement electronically. This conclusion was further supported by the actions and communications of the parties after July 4th, including statements from Halliburton in a July 19th email requesting Fair to "put pen to paper" and advising him that "[w]e are not going to stay anything until we have a signed deal."[31]

Similarly, on the question of Fair's intent to sign an electronic record, the Court of Appeal concluded, as a matter of law, that the record failed to show that Fair printed his name at the end of his emails to Russo and Halliburton with any intent to formalize an electronic transaction.[32] While it acknowledged that a printed name or other symbol might, under the right circumstances be a signature under the Cal UETA and that some courts in other jurisdictions had in fact found names typed at the end of emails to be sufficient for purposes of the versions of the UETA adopted in those jurisdictions,[33] the Court of Appeal concluded that the facts in this case demonstrated only that the typing of Fair's name was Fair's own act, which, though a necessary prerequisite, was not itself sufficient to establish the typed name as an electronic signature under the Cal UETA.[34]

B. *Ruiz v. Moss Bros. Auto Group, Inc.*[35]

In *Ruiz v. Moss Bros. Auto Group, Inc.*, the Plaintiff, Enersto Ruiz, filed a putative class action case against his employer, Moss Bros., alleging failures to comply with various wage and benefits requirements, including failure to pay overtime and other wages and failure to pay final wages in a timely manner. In response, Moss Bros. petitioned for an order compelling Ruiz to arbitrate his individual claim based on an arbitration agreement the company claimed he signed electronically in September 2011, which provided in relevant part that the arbitrator may "hear only … individual claims" and has no authority to "consolidate the claims of others into one proceeding."[36]

In support of its petition, Moss Bros. offered a printed copy of the purported 2011 agreement with Ruiz from Moss Bros.' personnel files, which contained the name "Ernesto Zamora Ruiz (Electronic Signature)" and the date "9/21/2011 11:47 AM" on signature and date lines included therein, and a pair of declarations from its business manager, Mary K. Main. In her initial declaration, Main asserted that all persons employed by Moss Bros. and its affiliated dealerships were required to sign an arbitration agreement similar to that provided to Ruiz and that

Ruiz electronically signed that agreement "on or about September 21, 2011."[37] Additionally, in her reply declaration, Main explained that the subject arbitration agreement was included in an Employee Acknowledgement form presented to all Moss Bros. employees and that "[e]ach employee is required to log into the Company's HR system—each with his or her unique login ID and password—to review and execute the Employee Acknowledgement form."[38]

In his opposition papers, Ruiz argued that Main's statements in her declarations were merely conclusory statements that were not enough to prove by a preponderance of the evidence that the electronic signature on the purported arbitration agreement was an act attributable to himself. Therefore, Ruiz argued, Moss Bros. had both failed to meet its burden under the Cal UETA and failed to establish that a valid agreement existed between the parties. The trial court agreed with Ruiz and denied Moss Bros.' petition.[39]

The Court of Appeal upheld the trial court, concluding, based on a review of the undisputed evidence in the case, that Moss Bros. had failed to present evidence sufficient to support a finding that the electronic signature on the arbitration agreement was in fact the act of Ruiz.[40] According to the Court of Appeal, the evidentiary burden that Moss Bros. needed to meet in this case was not a difficult one and essentially only required Moss Bros. to explain that Ruiz's name could only have been placed on the 2011 agreement by someone using his unique login ID and password, that the date and time appearing next to the electronic signature indicted the date and time that the signature was made, that all employees were required to use their login ID and password each time they access the HR system and signed electronic documents, and, therefore, the electronic signature on the 2011 agreement was apparently made by Ruiz at the time appearing on the record. Moss Bros., however, failed to provide adequate explanation. Rather, it offered only Main's unsupported conclusion that Ruiz was the person that electronically signed the 2011 agreement.[41] Critically, the Court noted, "Main did not explain how, or upon what basis, she inferred that the electronic signature on the 2011 agreement was 'the act of' Ruiz" and that this failure "left a critical gap in the evidence supporting the petition."[42]

IV. CONCLUSION.

The requirements that must be satisfied for an electronic record or electronic signature to qualify for the protections of the Cal UETA are

generally quite broad and flexible and, as the court in *Ruiz* noted, in many cases the plaintiff's evidentiary burden is not difficult to meet. However, as demonstrated by the decisions reached in the *J.B.B. Investment Partners, Ltd*. and *Ruiz* cases, there are certain minimum showings that a proponent of a purported electronic record or electronic signature must make, and where these minimum showings are not (or cannot be) made, California courts will refuse to enforce the purported agreement. Accordingly, parties seeking to create binding contracts electronically should implement and require consistent adherence to certain standard practices and processes in order to ensure compliance with the Cal UETA.

For example, any party seeking to reach an agreement via email or other electronic communications should include in those communications a clear express statement that the parties agree to formalize their agreement and conduct the transaction by electronic means, and that acceptance of the proposed agreement may be accomplished by electronic means. Additionally, parties should structure any email or electronic offers to include signature blocks or other designated places for the parties to "sign" the agreement by typing their names so that there is a clear distinction between the typed names that are serving as electronic signatures on the electronic agreement and any names typed or automatically inserted as part of an email signature or sign-off. Also, any electronic contracting or electronic signature process must include at least one reliable means for authentication so that there is definitive evidence linking each electronic signature, regardless of the form it takes, to the specific individual to whom such signature is attributed. Thus, at a minimum, each signor should be required to input some sort of unique indentifier, such as a passcode, ID number, or email address, for authentication purposes and the system should retain a record of the entry of that identifier.

Protocols such as these, if routinely followed, should provide parties seeking to create enforceable contracts and agreements electronically in California with more than adequate means to satisfy the minimum requirements of the Cal UETA and to thereby secure the protections it affords.

NOTES

1. Uniform Electronic Transaction Act (UETA), approved by the National Conference of Commissioners on Uniform State Laws on July 23, 1999. A copy of UETA can be found online at: http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf.

2. Civ. Code, §§1633.1 to 1633.17.
3. The failure of any given electronic record to satisfy the requirements for applicability of the Cal UETA does not itself render the purported agreement invalid or unenforceable. Such purported contracts may still be enforceable either under California common law of contracts (subject to satisfaction of the requirements thereof and any applicable defenses, such as the statute of frauds) or, if the transaction includes interstate commerce, the Electronic Signatures in Global and National Commerce Act ("E-SIGN") (15 U.S.C.A. §§7001 et seq.), which is the federal equivalent of the UETA.
4. Civ. Code, §1633.7
5. Smedinghoff, Thomas J., The Legal Challenges of Implementing Electronic Transactions, Uniform Commercial Code Law Journal (Vol. 41, No. 1), 2008.
6. Civ. Code, §1633.3, subd. (c).
7. Civ. Code, §1633.5.
8. Civ. Code, §1633.2, subd. (h).
9. Moore, Mark, UETA and E-Sign: An Overview with Attention to Current Issues, Business Law News, The State Bar of California, 2002.
10. Moore, Mark, UETA and E-Sign: An Overview with Attention to Current Issues, Business Law News, The State Bar of California, 2002.
11. UETA Section 5, Comment - 2.
12. UETA Section 5, Comment - 2.
13. Smedinghoff, Thomas J., The Legal Challenges of Implementing Electronic Transactions, Uniform Commercial Code Law Journal (Vol. 41, No. 1), 2008, p. 12.
14. Civ. Code, §1633.2, subd. (h).
15. Smedinghoff, Thomas J., The Legal Challenges of Implementing Electronic Transactions, Uniform Commercial Code Law Journal (Vol. 41, No. 1), 2008, pp. 16-17.
16. Smedinghoff, Thomas J., The Legal Challenges of Implementing Electronic Transactions, Uniform Commercial Code Law Journal (Vol. 41, No. 1), 2008, pp. 16-17.
17. *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 181 Cal. Rptr. 3d 781 (4th Dist. 2014).
18. Smedinghoff, Thomas J., The Legal Challenges of Implementing Electronic Transactions, Uniform Commercial Code Law Journal (Vol. 41, No. 1), 2008, p. 17.
19. Civ. Code, §1633.9.
20. *J.B.B. Investment Partners, Ltd. v. Fair*, 232 Cal. App. 4th 974, 182 Cal. Rptr. 3d 154 (1st Dist. 2014).
21. *Id.* at 977-980.
22. *Id.* at 978.
23. *Id.* at 979.
24. *Id.* at 979.
25. *Id.* at 979.
26. *Id.* at 980.
27. *Id.* at 983.
28. *Id.* at 986.
29. *Id.* at 983.
30. *Id.* at 989.
31. *Id.* at 990.
32. *Id.* at 989.
33. See, e.g., *Preston Law Firm, L.L.C. v. Mariner Health Care Management Co.*, 622 F.3d 384 (5th Cir. 2010); *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 49 U.C.C. Rep. Serv. 2d 413 (7th Cir. 2002); *Lamle v. Mattel, Inc.*, 394 F.3d 1355 (Fed. Cir. 2005).
34. *Id.* at 989.
35. *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 181 Cal. Rptr. 3d 781 (4th Dist. 2014).

36. *Id.* at 839.
37. *Id.* at 839.
38. *Id.* at 841.
39. *Id.* at 841.
40. *Id.* at 842.
41. *Id.* at 843.
42. *Id.* at 844.

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