How to Avoid Forming Accidental Contracts via Email

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Email is an indispensable business tool. But the speed and informality of email can lead to the accidental use of contract-forming language, resulting in unintentional binding agreements. This problem is made worse by statutes that compel courts to be “liberal” in finding contracts formed by emails, even where one party did not mean to be bound. In this environment, companies need to recognize and protect themselves from the very real risk of accidental contracts.

The Law Recognizes Contracts Formed by Email

Contract formation is simple. It requires only an offer, acceptance, mutual consideration and agreement to be bound. Peterson v. Regina (S.D.N.Y. 2013). Importantly, the second element turns on its objective—not subjective—nature. Krumme v. WestPoint Stevens, Inc. (2d Cir. 1998). If an email signals an intent to be bound, even if by careless or accidental language, it will trump any unstated reluctance to form a contract. What matters is whether it is reasonable for the receiving party to believe there is an agreement. Emails can satisfy these requirements.

State and federal laws bear this out. The Uniform Electronic Transactions Act of 1999 has been adopted or copied by all 50 states. It provides that a contract “may not be denied legal effect solely because an electronic record was used in its formation,” and it mandates that courts must be “liberal” in upholding contracts formed electronically. In addition, the UETA specifies that courts must engage in an objective analysis of the electronic communications themselves, and not the party’s personal or subjective views. This means that a contract is based on what the person writes, not what she thinks. In 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (E-SIGN). 15 U.S.C. § 7001 (2000). This statute essentially extends the UETA to interstate and foreign commerce. Importantly, E-SIGN preempts state laws imposing “consequences” on parties that do not create “originals” of contracts. Physically signed contracts are thus unnecessary.

Courts Enforce ‘Accidental’ Email Contracts

Courts have embraced their responsibility to be “liberal” in finding contracts in emails, even where they are accidental or unintended. For example, in Williamson v. Bank of New York (N.D. Tex. 2013), lawyers exchanged multiple emails to settle a bank’s foreclosure on a home. Responding to a counteroffer from the homeowner’s counsel, the bank’s counsel said it was “doable” but that a week would be needed to prepare a draft agreement. These emails were “signed” with a first name and an automatic signature block. The homeowner fired his lawyer and refused the settlement—which had not yet been put into a formal writing. The court nonetheless ruled that a contract had been formed. The electronic “signatures” sufficed, and the “doable” comment was deemed an acceptance of a counteroffer. The homeowner had to accept a deal he did not want or think was binding, pieced together from several email exchanges.

The parties faced a similar outcome in Stevens v. Publicis, S.A. (N.Y. Sup. Ct. 2008). There, an executive sought to renegotiate the terms of an employment agreement through several rounds of emails. The CEO of the company emailed his understanding of the new terms to the executive, who responded, “I accept your proposal.” Before a formal writing could be prepared, however, the executive changed his mind. In the ensuing litigation, the court ruled that the parties had an enforceable contract, as shown by the emailed agreement on terms and the signature
blocks. Again, based on email alone, a party was forced to accept a deal he did not think was binding yet.

Email contracting has become so commonplace that it requires fairly outlandish circumstances for a court to reject such a contract. For example, in Beastie Boys v. Monster Energy Company (S.D.N.Y. 2013), the music group sued Monster for copyright infringement based on its public use of a Beastie Boys music remix created by a disk jockey called “Z-Trip.” Monster sued Z-Trip for breaching a supposed contract for the use of the remix. Monster based its claim on an email where it asked Z-Trip to “approve” the remix before Monster posted it on the Internet. Z-Trip responded “Dope!” and commented on the remix. Monster said that it believed Z-Trip’s reply was a contractual approval to use the remix. The court ruled that the word “Dope!”—although “memorable”—was “entirely too enigmatic and elliptical to constitute the clear and unambiguous acceptance necessary for contract formation.” It seems unlikely that most contract disputes involving business-to-business emails will require the interpretation of slang.

Companies Can Reduce the Risk of Accidental Email Contracts

The law addressing contract formation by email reveals several risks for companies. There is no requirement of a formal writing or a physical signature. Loose language—like “doable”—can signal formal, binding acceptance of an offer. Multiple emails will be read together to form a single contract. Last, an objective review of the parties’ emails will trump any unstated reluctance to be bound. These risks add up to the threat of accidental contracts formed by rushed or imprecise emails. Apart from training employees about these risks, there are at least four preventative steps companies can take.

First, business emails should state that the company intends to be bound only by a physically executed, formal written agreement that includes all customary provisions. Courts have relied on such language to reject claims of email contracts. In Rubenstein v. Clark & Green Inc. (2d Cir. 2010), one party stated that it needed a “more comprehensive understanding in writing” before it could be bound; and in 1-800-Contacts Inc. v. Weignier (Utah App. 2005), an email offer was “not to be considered legally binding until a physically executed contract” was completed. Such phrases in emails undercut contract formation.

Second, businesspeople should be explicit about any hurdles they must clear before closing a deal. They may think it is obvious that an offer is subject to conditions, but their counterparty may disagree. So it is a best practice for emails to recite requirements such as management approval or further due diligence. Courts relied on such statements to reject contracts by email in such cases as Enable Commerce v. Standard Register Co. (S.D. Ohio 2011), where “upper management approval” was required, and Tiger Team Technologies Inc. v. Synesi Group Inc. (D. Minn. 2009), where a royalty rate was “yet to be determined.”

Third, companies should consider applying automatic disclaimers to business emails, to reinforce that run-of-the-mill emails will not constitute contracts. Such disclaimers might state that “the email ‘signature block’ does not constitute a signed writing for purposes of a binding contract,” or that “the sender of this email is not authorized, and has no intent, to make offers or contracts by email, unless the phrase ‘I hereby so contract and sign’ appears in the text.” The more tailored the disclaimer can be to the email itself, the better. This can be accomplished through the use of merge fields that reflect the sender’s and recipient’s names, the date and even the name of a manager (if any) needed to authorize a contract. The disclaimer can also time-limit any price quotes.

Finally, as noted above, companies can implement policies that restrict the use of imprecise language in business emails. Employees should be cautioned to be careful in email, to avoid terms such as “offer” and “accept” unless they really mean it, to avoid unconditional “promises” and to correct misinterpreted emails promptly. These policies can also include random auditing to detect non-compliance and nip problems in the bud before they blossom into litigation.

Email has fostered lightning-fast and informal deal making. The law makes clear that inadvertence will not undo an email contract. Adapting to this new business environment through greater message discipline is a prudent way for companies to avoid the serious risk of accidental contracts.

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