

## E-MAIL OFFERS AND ACCEPTANCE

by Cynthia A. Lammert

ication originally written or typed on paper, an e-mail retrievable from computer storage serves the purpose of the statute of frauds," the court held.

**In today's hyperkinetic business environment, casual use of e-mail is commonplace. Many attorneys and real estate brokers communicate electronically, believing that they have the luxury of informal negotiations by keystroke, and that no agreement is made unless and until paper documents are inked. However, those who convey an offer or acceptance via email may unwittingly bind themselves or their client to a real estate purchase or lease agreement.**

Although it remains the conventional practice to have original documents executed by the parties, courts nationwide are now considering electronic agreements to have the same legal effect.

In *Naldi v. Grunberg et al.*, 2010 N.Y. Slip Op. 07079, a New York appellate division court unanimously held that "an e-mail will satisfy the statute of frauds so long as its contents and subscription meet all requirements." The *Naldi* court expansively interpreted the term "writing" as used in New York's statute of frauds to encompass electronic communications and electronic signatures. "As much as commu-

*Oak Park Associates* (Sept. 14, 1984), 6th Dist. No. 1-84-031.

In *Berger v. HSBC Bank USA*, 9th Dist. No. 24986, 2010-Ohio-2736, the court found that a seller of real property accepted the offer of a buyer via email correspondence from seller's agent. The seller's agent sent an e-mail to the buyer, stating "your offer has been accepted. I need to get a few things out of the way, then I will send you addendums and instructions, thanks."

Because the acceptance of the buyer's offer was not conditioned upon the buyer's assent to the additional addenda and instructions, the *Berger* court determined that the seller accepted the buyer's offer. The court also rejected the contention that the buyer's acceptance was invalid because the buyer did not sign the offer to purchase. Although acceptance was required to be in writing pursuant to the terms of the buyer's offer, the offer did not prescribe how written acceptance was to be made, and so the e-mail communication sufficed.

Ohio's Statute of Frauds, R.C. 1335.05, states:

Other courts likewise seem to be inclined to honor e-mail communications as binding. In *Shattuck v. Klitzbach* (Mass. Super. 2001), 14 Mass.L.Rptr. 360, a Massachusetts court held that "the typed name at the end of an e-mail is more indicative of a party's intent to authenticate than that of a telegram as the sender of an e-mail types and sends the message on his own accord and types his own name as he so chooses."

While there are few Ohio court cases relating to whether an email suffices as a signature for purposes of statute of frauds in real estate transaction, at least one Ohio court has suggested that typewritten signatures, including those in a telegram, are adequate. See *Hart v.*

defined by common law. "A signed memorandum is sufficient to satisfy the Statute of Frauds so long as it (1) identifies the subject matter of the agreement; (2) establishes that a contract has been made; and (3) states the essential terms with reasonable certainty." *Landskroner v. Landskroner* (2003), 154 Ohio App.3d 471, 483.

However, "where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both," then a prior acceptance will not suffice to bind a party until memorialized in an actual document. See *Artisan Mech., Inc. v. Beiser*, 2010 Ohio 5427, ¶33, citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 151-152.

Accordingly, in any email communications where it is arguable that the communication forms the basis of an offer or counteroffer or acceptance of the same, it is advisable to include a standard disclaimer in all e-mail communications clearly stating that the content may not be deemed an offer, counteroffer or acceptance until paper documents are mutually executed between the parties themselves. It is also prudent for a broker or agent to qualify such communications by stating that the broker is not authorized to bind the principal.

Similarly, parties who represent a buyer or seller should use caution before forwarding their client's communications to the other party or the other party's agent, as these also may be deemed binding and valid if the client expresses a willingness in the e-mail to accept certain terms and includes an electronic signature. Adhering to the foregoing practices will help a client to avoid both leverage by the opposing party in negotiations and potential litigation over whether or not a binding agreement was made via an e-mail exchange. ➔



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