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## **ON THE LEGALITY OF ELECTRONIC AND DIGITAL SIGNATURES**

Under current stay-at-home orders, it can be difficult for parties to sign documents. If one party does not have a home printer and scanner, the documents must be physically delivered to that party, who executes them, and then physically returns the document to the other party. If this is done via hand delivery, issues of medical safety and spreading disease are major concerns. If this is done by mail, it could take a week or more for a single document to be signed and returned. However, online options, such as DocuSign, allow parties to execute documents online without the need of a printer and scanner. But the question arises—is an agreement executed via DocuSign legally enforceable?

### **IS A DIGITAL SIGNATURE LEGALLY VALID?**

The Texas Uniform Electronic Transactions Act (UETC) governs electronic signatures.<sup>1</sup> The UETC was passed by the Legislature in 2007 and became effective April 1, 2009.

The UETC has several key features:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.<sup>2</sup>
- A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.<sup>3</sup>
- If a law requires a record to be in writing, an electronic record satisfies the law.<sup>4</sup>
- If a law requires a signature, an electronic signature satisfies the law.<sup>5</sup>

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<sup>1</sup> Tex. Bus. & Comm. Code Ch. 322

<sup>2</sup> *Id.* at § 322.007(a).

<sup>3</sup> *Id.* at § 322.007(b).

<sup>4</sup> *Id.* at § 322.007(c).

<sup>5</sup> *Id.* at § 322.007(d).

- The electronic signature is attributed to a person if it was that person’s act, and its effect is determined by the context and circumstances of its creation, execution, or adoption.<sup>6</sup>
- In a legal proceeding, evidence of a record or signature may not be excluded because it is in electronic form.<sup>7</sup>

The UETC does not define “signature” or “sign.” The official comment states that the Act “defers to existing substantive law” for “the meaning and effect of ‘sign.’”<sup>8</sup> However, three courts have issued opinions on what constitutes a “signature” under the UETC—two Texas appellate courts and one federal district court. All three cases involved the signing of emails as settlement agreements or contracts. While the two state appellate courts split about what constitutes a signature in an email, all three cases have one common element—the courts looked to the intent of the parties and whether they intended to “sign” the emails. Therefore, the key element in such cases is the signing party’s intent, which is the same standard as if they signed the document by hand with a pen.<sup>9</sup>

### I. *Cunningham v. Zurich American Insurance Company*

The first Texas case to consider whether an electronic signature was legally binding was *Cunningham v. Zurich American Insurance Company*.<sup>10</sup> Cunningham was a medical malpractice case where the plaintiff’s counsel sent the defendant’s counsel a settlement demand via email. In response to the email, the defendant’s attorney reiterated the terms of the settlement and accepted the offer on the condition that the parties would enter into a Rule 11 Agreement and execution of a more formal agreement at a later date. Other emails followed over several days, where the terms of the agreement were discussed in greater detail. Ultimately, the settlement did not go through and the plaintiff sued the defendant for breach of contract, claiming the email acceptance of the settlement agreement was binding.

The Second Court of Appeals held that a valid Rule 11 agreement can be made via email under the UETC. However, the question remained whether the defendant’s attorney had “signed” the email, as required by Rule 11. The court focused on the signature block at the end of defendant counsel’s email accepting the settlement. Because there was no evidence that the signature block was actually typed by the attorney (as opposed to being automatically generated by the email

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<sup>6</sup> *Id.* at § 322.009.

<sup>7</sup> *Id.* at § 322.013.

<sup>8</sup> *See* Tex. Bus. & Com. Code Ann. ch. 322 official comment.

<sup>9</sup> *See In re Estate of Martin*, 09-05-466 CV, 2006 WL 1777827, at \*2 (Tex. App.—Beaumont June 29, 2006, no pet.).

<sup>10</sup> *Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519, 530 (Tex. App.—Fort Worth 2011, pet. denied).

program) the email was not “signed” within the meaning of Rule 11. Nothing in the email suggested that it was sent with the intention that the signature block be a “signature.” Therefore, the evidence did not prove that the defendant’s attorney intended to sign the email by attaching his signature block.

## II. *Khoury v. Tomlinson*

*Khoury* involved a business deal gone wrong.<sup>11</sup> Khoury, an investor in an oil company, became concerned about the lack of transparency in an oil contract between Iraq and Syria. The parties met in person and verbally agreed that Tomlinson, the president of the oil company, would personally repay Khoury’s investment of \$40,000. A week after the meeting, Khoury sent an email to Tomlinson summarizing the repayment agreement. Tomlinson replied in an email, writing, “We are in agreement.” However, Tomlinson did not type his name, or insert a signature block, at the end of the email. Tomlinson did not make any of the agreed repayments and Khoury sued for breach of contract.

The First Court of Appeals held that the email reply satisfied the Statute of Frauds. Citing numerous prior cases, the court reasoned that the signature requirement of the Statute of Frauds authenticates a document for purposes of enforcement against the party who signs it. Texas law treats documents as signed when they contain any mark sufficient to show intent to be bound by document. The UETA was designed to remove barriers to electronic transactions by setting an expansive view of what constitutes electronic signatures and the court held that a signature block or typed name in an email satisfies the requirement of a “signature” under UETA (on this point, the court disagreed with Second Court of Appeals opinion in *Cunningham*). However, because Tomlinson neither typed his name in the email, or attached a signature block, the question remained whether or not he “signed” the email.

The court noted that, while Tomlinson did not type his name in the email, he sent it from his email account, which contained his email address. Further, Tomlinson testified that he sent the email and wrote its contents. Therefore, the evidence reasonably established that Tomlinson intended to authenticate the email and the email address in the “from” field satisfied the definition of a “signature.” The court found the agreement was valid and enforceable.

## III. *Williamson v. Bank of New York Mellon*

The third case to consider electronic signatures was a federal district court case. *Williamson* involved a foreclosure of a home mortgage.<sup>12</sup> After foreclosure and a subsequent state court suit that was removed to federal court, counsel for the two parties exchanged numerous emails

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<sup>11</sup> *Khoury v. Tomlinson*, 518 S.W.3d 568, 572 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

<sup>12</sup> *Williamson v. Bank of New York Mellon*, 947 F. Supp. 2d 704, 709 (N.D. Tex. 2013)

discussing settlement. The parties reached an agreement via email, wherein counsel for Williamson concluded his emails with “Marc” and counsel for the bank closed his emails with his signature block. The parties filed a Joint Notice of Settlement with the court, stating that they had reached a settlement agreement. Later, Williamson fired her attorney and attempted to void the settlement agreement. The bank moved to enforce the agreement. The question before the court was whether the email chain constituted a valid Rule 11 Agreement and if it was “signed” as required by Rule 11.

First, the court concluded that Williamson’s attorney’s manually typed name (“Marc”) qualified as an electronic signature because it was an electronic symbol attached to a record and executed with the intent to sign the record as contemplated by UETA. A hand-typed name at the bottom of an email was no different than a handmade signature on a letter.

Second, the court concluded that the bank attorney’s signature block also qualified as an electronic signature because his email program did not automatically create the signature block on its own. Rather, the bank’s attorney must have created his signature block at some point in the past and directed that his email program automatically attach the signature block to his outgoing emails. The court held that this action affirmatively showed intent to sign the email as required by the UETA. The court reasoned that there was no fundamental difference between manually typing a signature block into a series of emails and typing the signature block once and instructing a computer program to apply it to future messages (this court also disagreed with the opinion in *Cunningham*). Therefore, the Court concluded that the attorneys intended to sign the agreement by way of their emails to one another and the agreement was valid and enforceable.

#### IV. Conclusion

The UETA recognizes the validity of electronic and digital signatures. While the courts are split regarding whether an automatically generated signature block expresses a party’s intent to sign a document, the courts agree that a party must intend to sign the document by making a mark, and thereby expressing their adoption of the document. Whether that mark is made by hand, by typing, or by some other means (such as DocuSign) it is valid so long as the party intended to sign the document.

#### **WHAT ABOUT ONLINE NOTARIES?**

Texas allows online notarizations.<sup>13</sup> The person signing the document must personally appear before the notary public at the time of the notarization, as defined by administrative rule.<sup>14</sup> The rule requires that the signatory, for whom the notarization is being performed, appear by an interactive two-way audio and video communication that meets the online notarization

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<sup>13</sup> Tex. Gov’t Code Ann. §§ 406.101 to 406.113. *See also* 1 Tex. Jur. 3d Acknowledgments, Etc. § 23.

<sup>14</sup> 1 Tex. Admin. Code § 87.41(c).

requirements provided by statute.<sup>15</sup> The online notary public must keep an electronic recording of the video in their records.<sup>16</sup>

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<sup>15</sup> *Id.* at § 87.1(6).

<sup>16</sup> Tex. Bus. & Com. Code Ann. § 322.012(a).