

## WHEN “YOU’VE GOT E-MAIL” MEANS “YOU’VE GOT A DEAL!”

Consider the following e-mail exchange between a buyer and supplier:

**Buyer:** “Hey, buddy, how’s it going? Hope to see your awesome boat on the lake on Friday. Could you provide 6 of those new systems you showed me yesterday by the end of the month? We’ve got a big project coming up and the boss is pushin’ hard. I know those systems are pricey, but they would make the job go a lot easier!!!”

**Supplier:** “Me too! Yeah, no problem. We’ve got plenty in stock, so I’ll deliver them on the 20th.”

**Buyer:** “Great and see you.”

- Has A Contract Been Established between the Buyer And Supplier?
- Is The Contract Enforceable?
- What Are The Terms Of The Contract?
- Does It Matter If Neither Person Signed His Name To The E-Mails?
- Can E-Mail Serve As Evidence Of A Contract At A Trial?

The short answer is the exchange probably created a binding contract. Any “gaps” in the contract would not prevent enforcement. Regardless, the e-mails would certainly be admissible at trial, even though nobody “signed” the e-mails.



E-mails reduce transaction costs and expedite communications, but their ease of use and the tendency toward informality can lead to liability. This article will focus on some of the hazards to avoid when using e-mail in your business.

### E-mail Can Form a Binding Contract

Because of the common, quick, and often casual nature of e-mail, not everyone realizes that clicking “Send” may have the same effect as signing a formal written contract on the dotted line. In general, a contract is formed when there is evidence of an agreement, including offer, acceptance, and consideration (“consideration” is some exchange of value: money or a promise to do or provide something). The contract’s creation can be as easy as a single click of the mouse or a brief e-mail exchange.

Many of us are familiar with filling out website forms and clicking “I Agree” when making an online purchase. This is a “contract.” Even the exchange of text messages on cell phones or instant messages on computers can form a contract. Another method of electronic contracting is Electronic Data Interchange, which involves the direct exchange of electronic information between computers, and the use of “electronic agents” (software programs that initiate action or respond to an electronic message without human intervention).

### WHAT’S INSIDE

	page
Advantages of Federal Trademark Registration	3
Review Your Retirement Plans!	4
Trademark Scams - Be on the Lookout	5
Felhaber’s Business Law Seminar	5
Felhaber 2006 Seminars	6

### Terms of an E-mail Contract

The informal nature of e-mail exchanges may lead to a contract that is spread over numerous e-mails without any mention of provisions normally found in boilerplate contract language. These missing terms may be implied from past conduct, industry custom or practice, or from Article 2 of the Uniform Commercial Code ("UCC") in the case of a contract for the sale of goods (a/k/a supplies or materials).

The UCC provides that a contract between merchants (as opposed to individual consumers) still exists if a party accepts the offer but states additional or different terms. The new or different terms become part of the contract unless they materially change the contract.

In a contract not involving the sale of goods, the common law provides that the parties must generally come to a "meeting of the minds" before a contract is formed, shown by an acceptance exactly matching the offer (known as "mirror image rule"). Parties contracting by e-mail should be cautious to expressly include the same terms they would include in a paper contract and to limit acceptance to the terms of the offer, if that is their intent. How strictly the mirror image rule will apply to e-mail contracts not covered by the UCC remains an issue for the courts decide.

### Writing & Signature

**As a general rule of contract law, a contract does not have to be in writing or signed to be enforceable, unless it falls under the Statute of Frauds.**

The Statute of Frauds varies from state to state, but usually requires that contracts for the sale of goods over \$500 and contracts that cannot be fully performed within a year be recorded and authenticated by the party against whom enforcement of the contract is sought. Many state and local statutes and regulations also require a writing and signature for certain contracts like the sale of land.

In 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act ("E-SIGN") (15 U.S.C. § 7001 et seq.), applying to interstate and foreign transactions. E-SIGN created no new substantive rules of contract law, but instead

provides that signatures and contracts may not be denied legal effect solely because they are in electronic form. Essentially, if there is a legal requirement for a record to be in writing or for a signature, an electronic signature or record satisfies such requirement. Most states and the District of Columbia have adopted some version of the Uniform Electronic Transactions Act ("UETA") statute, giving electronic records and signatures the same legal effect as ink signatures and paper records. E-SIGN and UETA are technology-neutral and do not favor any form of electronic signature or contract over another. Nor does either E-SIGN or UETA require or force any party to use or accept an electronic contract or signature.

E-mails can be electronically or digitally signed. Courts have even held a typed name at the end of an e-mail message to constitute a signature for purposes of the Statute of Frauds. Hence, one particular hazard to watch out for is the default "signature block" many people have set their e-mail program to include automatically at the end of their e-mails when they hit "Send" or "Reply." It is important to consider eliminating the automatic use of such signatures and to protect against the forgery or misuse of electronic or digital signatures and your e-mail account. It is equally important to remember to include a signature on an e-mail if you wish to form a contract.

Note that some contracts do require a paper document and ink signature. Both E-SIGN and state enactments of UETA contain numerous exceptions, often to protect consumers, such as notices of default or where other statutes require that specific text or disclosures be signed or initialed. Therefore, you should ask your attorney to check the relevant statute to determine its applicability to a particular transaction.

### Recordkeeping and Evidence

You wouldn't sign a paper contract, then throw it in the trash, right? You shouldn't simply delete every e-mail that comes into your inbox and put it in the "trash" either.

If you are in a dispute with another party, you have an obligation to preserve relevant information, including electronic information and data. For that reason, and because an e-mail must be authenticated if you wish to use it in court, it is important to establish and follow a policy of preserving electronic records,

including e-mail messages. Your routine policy of preserving electronic records and data should extend to all records and data, not only e-mails establishing contracts. Improper destruction of any business record can lead a court to an inference of tampering. Whether e-mail messages you have sent or received may be used in court depends on whether they can be authenticated. Courts have relied upon e-mails sent by a party and produced by that party from its files to satisfy the authentication requirement.

### Basic Rules for Using E-mail

- **Tactful Language.** Don't write anything you would be embarrassed about next week or next year. Don't disparage co-workers or competitors. Remember, e-mails can become evidence in litigation, and besides, you never know to whom that e-mail will be forwarded.
- **Authenticate.** Determine how you will authenticate the other party's electronic signature to make sure it hasn't been used fraudulently.
- **Signature Block.** Consider changing the settings on your e-mail program so that a signature block is not automatically included at the end of each message sent. Also consider including a disclaimer addressing your contract, privacy and confidentiality policies.
- **Document Retention.** Establish and maintain a document retention policy which allows you to archive and retrieve your e-mail exchanges.

- **Careful Writing/Reading.** If you intend your e-mail to form a contract, proofread the e-mail as carefully as you would a traditional contract and consider adding language indicating that you have the specific intent to bind the other party, should they accept. Make sure you have conveyed your intentions clearly. Read the other party's e-mail equally carefully. Consider having your attorney review the e-mail exchange, just as you would with any other contract.

### Conclusion

Because of the ease of its use, many people tend to forget that e-mail messages can last a long time – even longer than a letter written on paper. The potential for an informal and perhaps inappropriate message to get into the hands of a jury, competing business, or reporter, should always be kept in mind. Likewise, binding contracts can be made without formal signatures or a detailed listing of terms.

Deliberate and considered e-mail messages can lower transaction costs and increase the speed of business. At the same time, care must be used to lower the risk of liability that could accompany an informal, thoughtlessly written and quickly sent e-mail.

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## ADVANTAGES OF FEDERAL TRADEMARK REGISTRATION



A trademark is essentially the brand name for your product or service. The first person to use a mark in conjunction with a product or service obtains legal priority of ownership, which allows that owner to stop others from using a confusingly similar mark on related goods or services in the same business territory.

Registration of a mark on the Federal Principal Register at the United States Patent and Trademark Office (PTO) confers a number of legal advantages such as:

1. Federal jurisdiction for infringement claims
2. Profits, damages and costs are recoverable, and attorney fees may be awarded, along with the possibility of treble damages.
3. Registration is prima facie evidence that the mark is not confusingly similar to other registered marks and that the mark has acquired secondary meaning (distinctiveness).
4. After 5 years a Principal Register registration may become “incontestable” as conclusive evidence of the registrant's exclusive right to use of the mark, subject to certain statutory defenses.

## REVIEW YOUR RETIREMENT PLANS! SWEEPING PENSION CHANGES ARE ON THE HORIZON

The Pension Protection Act of 2006 (“PPA”) was signed into law August 17, 2006. It is expansive legislation covering a broad range of rules affecting all qualified retirement plans, including traditional pension plans, profit-sharing plans, 401(k) plans, 403(b) plans, IRAs and Roth IRAs. The provisions largely take effect in 2007 and 2008. Highlights of the PPA include:

Retirement plan payout and rollover rules are liberalized. Beginning in 2007, plans may allow nonspouse beneficiaries to make tax-free rollover distributions. (Previously, only surviving spouses were able to defer income taxes through rollovers.) After 2007, direct rollovers from retirement plans to Roth IRAs will be allowed. Hardship distribution rules now may include hardship of any beneficiary, not just the hardship of a participant or dependent.

The PPA encourages 401(k) plans to adopt an automatic enrollment feature. If an automatic contribution feature is combined with a minimum level of matching or nonelective employer contributions, the plan will be deemed to automatically pass most discrimination testing.

The PPA contains many reforms governing pension plans. There are many mandatory requirements for all pension plans, including a requirement that plans offer a 75 percent

survivor annuity, in addition to the 50 percent survivor annuity that such plans generally provide. Traditional pension plans may also allow for in-service distributions starting at age 62.

The Act increases participant notice requirements; provides for permanent extension of the provisions of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), including making permanent the higher contribution and catch-up limits allowed for qualified plans and IRAs; and expands the ability of plans to use qualified “fiduciary advisers” to offer investment advice to employees.

If you sponsor a qualified retirement plan, you should review your plans to determine how the mandatory and optional changes may affect you. Contact Ruth Marcott or Tom Hughes for assistance in reviewing your plans for compliance and opportunities presented by the PPA.

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5. A Principal Register registration is constructive notice of trademark ownership so as to eliminate infringers asserting a defense of good faith adoption and use after the date of registration.
6. Nationwide priority is given for registrations filed after November 16, 1989. Thus, the registrant is entitled to a “constructive use date,” nationwide in effect, as of the filing date of the application.
7. A Principal Register registration may be used to stop articles bearing an infringing mark from being imported into the United States.

The cost of federal registration is reasonable. The PTO filing fee is about \$300 and attorney fees to prepare the application are often as little as \$700-\$1200. An application can be submitted quickly but completion of the registration process takes about 12 months.

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## TRADEMARK SCAMS - BE ON THE LOOKOUT

The U. S. Patent and Trademark Office (PTO) has issued "consumer alerts" that "[A]n entity doing business as the 'United States Trademark Protection Agency' is NOT affiliated with the United States Patent and Trademark Office."

If you own a federal trademark registration, your name and address is listed in the PTO records. Various companies search those PTO records and then send you "official" looking notices or even invoices directing you to pay fees for registration, monitoring for other marks similar to yours, or renewal. MANY OF THOSE OFFERS ARE SCAMS.

Beware of bogus notices and official-looking form letters regarding your trademark or domain name. Scam letters often use misleading company names or logos that look like official government correspondence such as "Trademark Renewal Service in Washington, D.C.", or "United States Trademark Protection Agency". Some use alarming wording such as "Cancellation Alert".

One scam seeks \$625.00 for a three-year listing in a relatively useless publication called the "Register of Protected Trademarks in the TMG Trademark Guide on the Internet."

Some companies offer a "monitoring" service at a cost of several hundred dollars. Such a service is not necessarily a scam since there are reasons to monitor for infringing usage or applications to register new marks. But you need to carefully consider whether you truly get value for your money. Most trademark owners do not use a monitoring service.

Companies too often inadvertently pay what seems to be an "official" bill, sometimes never realizing that they get no real service. At the extreme, some companies pay thinking that they have satisfied legitimate filing requirements of the PTO only to find later that their registration is cancelled because the required papers were NOT filed.



Don't waste your money. Check with us before paying for renewal or monitoring services. The PTO does not send "reminders" nor does it offer to represent trademark owners for a fee.

If you have a federal trademark registration you do need to file an Affidavit of Continuing Use in the 6th year of use, and you do need to file to renew every 10th year. We can help you with those filings. If we filed your registration application we will try to alert you when those deadlines are approaching.



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Register Now!

### Felhaber's Business Law Seminar *Business Law from A to Z An Overview of Today's Hottest Issues*

Tuesday, October 24, 2006  
Town & Country Club  
St. Paul, Minnesota  
8:00 am to 1:00 pm

*Complimentary Breakfast & Luncheon*

Please join us to learn about a broad array of legal issues, from hiring and firing to love, death and taxes. Felhaber attorneys will be the seminar presenters. We are delighted to offer this seminar free of charge to Felhaber clients and friends.

Log on to [www.felhaber.com](http://www.felhaber.com) to learn more about this seminar, and to register online.

## 2006 COMPLIMENTARY SEMINARS

Please attend one of our upcoming seminars, with discussions on a variety of timely legal topics. The seminar presenters include our firm attorneys who have expertise in the seminar subject matter. Seminars include a complimentary continental breakfast and/or luncheon.

### **Business & Corporate Law**

Tuesday, October 24, 2006      Town & Country Club  
St. Paul, MN

### **Builder Developer Seminar**

Thursday, November 2, 2006      Town & Country Club  
St. Paul, MN

### **Labor & Employment Law**

Friday, November 17, 2006      Airport Marriott, Mall of America  
Bloomington, MN

To receive a seminar invitation, e-mail [kdyck@felhaber.com](mailto:kdyck@felhaber.com). State your name and address with the name of the seminar(s) you wish to attend. You may also log on to [www.felhaber.com](http://www.felhaber.com), which will have online seminar registration available three weeks prior to the seminar date.

## Business Report

*The Business Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.*

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