



Paul W. Griepentrog
General Corporate
(262) 951.7129
pgriepentrog@gklaw.com



Jonathan R. Ingrisano
Litigation
(414) 287.9611
jingrisano@gklaw.com

Don't Let Your Email Amend Your Contract

You recently sold your business in a heavily negotiated deal. One of the deal's important provisions for you was the right to receive a series of contingent payments from the buyer based upon the performance of your former business after closing. After close, however, the buyer refuses to pay, citing an email from you supposedly agreeing to accept a significant deferral in the timing of these payments. While you must admit that your email could be taken different ways, you never intended to delay payment. You ask your lawyers: "Certainly, a simple email cannot amend that thick asset purchase agreement?" The short answer is "Yes, it can."

Lawyers try to prevent these kinds of disputes about subsequent alleged amendments to the agreements they negotiate. Most agreements have boilerplate "signed writing" requirements that require any amendment or modification to be in writing and signed by the parties to the agreement. In addition, the law generally requires that certain types of contracts be contained in a writing signed by the party it is to be enforced against - this is the so-called statute of frauds. The rapid proliferation of email use in business communication begs the question: "Do email messages questionably showing an amendment or modification satisfy these signed writing requirements?"

Most courts conclude that an email is a "signed writing" if the email contains either a typed or electronic signature. For example, the Seventh Circuit Court of Appeals, of which Wisconsin is a part, has held that the sender's name typed on an email is sufficient to constitute a "signed writing" and permitted an employee's email to modify a written purchase order between a supplier and a manufacturer. *Cloud Corp. v. Hasbro*, 314 F.3d 289 (7th Cir. 2002). The court noted the law has never required a handwritten signature. Other courts have upheld typed signatures in emails by analogizing them to telegrams, whose typed signatures have long been held to satisfy legal "signed writing" requirements for contract formation, amendment and modification.

This is not to say that every "signed" email will form a contract or modify an existing one. Even signed emails will not be given legal effect as contracts or modifications if they omit essential terms or demonstrate merely continuing negotiations rather than formal offer and acceptance. Most business people would still prefer to preempt these legal questions and leave no doubt that their email communications are not meant to modify an existing contractual arrangement. Here's how:

First, recognize the downside of email. Users are often too informal, colloquial or brief in email. They hit "send" without giving the contents the same careful thought and attention that they would if the same message were transmitted through more traditional means. A glib email can be troublesome evidence in the hands of an opportunistic opponent with an incentive to read it to his or her advantage, often well after email was sent.

More importantly, you may want to talk with your lawyer about the possibility of limiting what constitutes a "signed writing" in your contracts to exclude emails. This includes asset purchase agreements, licenses, purchase orders and offers to purchase. A simple sentence excluding email from the definition of a "signed writing" should remove doubt allegedly created by your subsequent emails. Note, however, that there are some instances where you will want the flexibility to alter your agreements informally by email. Your lawyer can help you decide.

Business owners pay their lawyers good money to negotiate contracts to meet their needs. Business owners must be vigilant that they do not mistakenly nullify important provisions in those contracts with later emails.

The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.