

Electronic Signatures and Agreements Can Form Binding Real Estate Sales Contracts and Can Modify Existing Listing and Agency Agreements

In 2000, the Kansas Legislature enacted the Kansas Uniform Electronic Transactions Act (KUETA). Under KUETA, any contract, record or signature may not be denied legal recognition or enforceability solely because it is in an electronic format.

Where a statute, regulation or agency guideline requires a contract, record or signature to be in writing, KUETA specifically allows electronic contracts, records and signatures to satisfy this requirement. However, if you would like to utilize electronic signatures and agreements in your business, please take note of these requirements and problems:

- (1) KUETA allows the parties to real estate transactions to utilize electronic signatures and agreements when certain requirements are met.
- (2) Although there is some uncertainty, it is highly likely that Kansas courts will determine that electronic records under KUETA satisfy any requirements that real estate documents be in writing.
- (3) KUETA only applies in situations where the parties agree in writing to conduct their business through electronic means.
- (4) However, electronic signatures and agreements still need to satisfy all requirements of a binding contract and signature and it can be much more difficult to prove the intent of the parties when electronic signatures and agreements are used.

While There is Some Uncertainty, It is Very Likely That Kansas Courts Will Determine That Electronic Records under KUETA Satisfy Any Requirements That Real Estate Documents Be in Writing

Under KUETA, the definition of “transaction” in the act does not explicitly state whether it applies to real estate transactions. However, the Kansas Court of Appeals has recently applied the provisions of KUETA in considering whether an electronic record would be sufficient to satisfy a requirement that an agreement to transfer real estate be in writing.

In the case entitled *In Re Marriage of Takusagawa*, No. 95,908 (Kan. Ct. App. 2007), the court explicitly determined both that KUETA overrules the Statute of Frauds where applicable and that KUETA applies to the transfer of interests in real property. This would clearly suggest that the Statute of Frauds requirements for real estate contracts would be satisfied by compliance with the provisions of KUETA.

KUETA Allows the Parties to Real Estate Transactions to Utilize Electronic Signatures and Agreements When Certain Requirements Are Met

Traditionally, the Statute of Frauds has required that all agreements for the sale of any interest in real property be in writing and signed by the parties to the agreement. K.S.A. 33-106. However, KUETA explicitly overrules the Statute of Frauds requirement in stating that when a law requires a contract, record or signature to be in writing, an electronic contract, record or signature will satisfy the law.

Under K.S.A. 2006 Supp. 16-1607(b), a contract “may not be denied legal effect or enforceability solely because an electronic record was used in its formation.” The statute further defines the term “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”

Record is Defined Very Broadly and Includes Any Method for Storing or Communicating Information That Can Be Stored and Retrieved

The definition of the term “record” is a standard definition designed to embrace all possible means of communicating or storing information except human memory. It includes any method for storing or communicating information, including written means of storage like paper, other fibers or even chiseled stone.

Information stored on a computer hard drive or disk drive, facsimiles, voice mail message, electronic mail messages, messages on a telephone answering machine, audio and video tape recordings and other electronic storage mechanisms would all be included under this broad definition of the term “record” under KUETA. As long as the information stored therein can be retrieved and reviewed in a perceivable form, this act is intended to apply to all electronically-created and stored information.

Electronic Signatures is Also Defined Very Broadly and Includes Nearly Any Method That Can Demonstrate Intent to Sign an Electronic Record

Under K.S.A. 2006 Supp. 16-1602(i), the term “electronic signature” is broadly defined as “an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” This provision of KUETA was intentionally drafted broadly to allow many types of technology and methods for signing electronically while maintaining legal compliance.

Under this definition, an electronic signature can be just about anything produced by electronic means (e.g., a symbol, result or consequence) that has been created electronically in order to demonstrate a party’s intent to sign an electronic record. Specific examples of electronic signatures allowed under KUETA include, but are not expressly limited to, the following:

- (1) Entering a password or personal information number (PIN);
- (2) Typing the individual’s name where indicated (or prompted) via computer keypad;
- (3) Responding to telephone keypad agreements (e.g., “press 3 to agree”);
- (4) Clicking the “I Agree” button in an online setting;
- (5) Orally consenting to an agreement on a telephone answering machine or voice mail;
- (6) Typing the individual’s name in an electronic mail message; and
- (7) Responding to an offer via facsimile on individual or corporate letterhead.

However, Electronic Signatures and Agreements Still Need to Satisfy All Other Requirements of a Binding Contract – Including Proof that the Parties Intended to Accept the Agreement

Fundamentally, a bargain reached through an electronic contract is the same as a traditional contract in writing on paper and the same contract law fundamentals apply. Any contract, whether electronic or on paper, requires an offer, acceptance, some form of consideration and the presence of no defenses that would prevent enforcement of the contract. If any of these requirements are not fulfilled by an electronic contract, then that contract will be invalid.

When the parties enter into an electronic agreement using an electronic signature (most likely in an email), it is much more difficult to prove that the parties actually intended that communication to form a binding agreement. In comparison, when the parties sign a written document stating the terms of the agency or sales agreement, there is overwhelming evidence (absent evidence of forgery) that the parties actually intended to enter into a binding agreement.

On a cautionary note, when you (or your clients and customers) are forced to ask a court to enforce an electronic signature or agreement, it will probably be much more difficult to prove intent as opposed to the traditional written and signed sales contract. As a result, it may be a good business practice from a risk management standpoint to obtain signed, written copies of sales contracts in lieu of electronic agreements when there is a risk that the contract may be challenged in court.

KUETA Only Applies to Transactions Between Parties That Agree in Writing to Conduct Business Through Electronic Means

KUETA does not require a contract or record to be created or communicated electronically. KUETA only applies to transactions between parties that agree to conduct the transaction through electronic means.

Under K.S.A. 2006 Supp. 16-1605(b), whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the conduct of the parties. Even if a party has previously agreed to conduct a transaction by electronic means, they may refuse to conduct other transactions by electronic means and cannot waive this right of refusal. K.S.A. 2006 Supp. 16-1605(c), (d).

As a result, if you would like to utilize electronic signatures and agreements in your individual business, it is recommended that you first obtain the written consent of the client (and any other parties to the transaction) to conduct business electronically. If you do not obtain the consent of the client or the other party to the transaction, any electronic signatures and agreements will not be valid and enforceable.

Conclusion – Although You Can Use Electronic Signatures and Agreements in Your Business, Please Be Mindful of Their Limitations in Certain Situations

During its last meeting, the Commission concluded that a listing agreement could be modified by an email and, if a dispute arose, the licensee and consumer would have to address civilly whether they intended to modify the listing agreement electronically and that all other contractual elements had been satisfied. It is our opinion that courts will also uphold a contract or agreement that is formed through electronic means such as an email or through the use of digital signatures.

However, we must caution that this is probably an individual business risk management decision. In situations where the parties attempt to rely on an electronic contract, it will be much more difficult to prove that both parties intended to enter into the agreement or contract when business is conducted electronically. Depending on the individual broker, it may be a good business practice to obtain signed copies of agreements for your files as a backup when you use electronic signatures or emails to form or modify agency agreements and sales contracts.

For more information on this and other issues, please go to <http://www.kansasrealtor.com/>. You may also contact Luke Bell, KAR Director of Governmental Relations at lbell@kansasrealtor.com or 785-267-3610 Ext. 2133.