

Finding a Paperless Panacea: Use of Electronic Signatures in Retail Real Estate Transactions

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Posted By: Chris A. Jenny & William R. West

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Improvements in technology give us the ability to store and retrieve volumes of information in digital form at the click of a button. More and more business is transacted via digital means. Yet, many landlords and tenants are hesitant to utilize these technological advances when it comes to the execution documents. Electronic signatures provide a way for parties engaged in retail real estate transactions to simplify their document execution procedures.

What In An Electronic Signature?

An electronic signature enables a party to execute a document without actually putting ink to paper. The Electronic Signatures in Global and National Commerce Act ("E-Sign"), discussed below, defines an electronic signature as "an electronic sound, symbol or process attached to, or logically associated with, a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. § 7006(5). Rather than signing a hard copy and delivering it to the other party, a party signing via an electronic signature typically "signs" the document using a software program accessible via computer or mobile device. Many software providers offer options for utilizing electronic signatures. These providers typically offer a variety of authentication and security measures, such as access codes, time, date and location stamps, and even biometric data.

Are Electronic Signatures Enforceable?

Yes, retail leases or amendments executed via electronic signatures are legally binding and enforceable. E-Sign, which was enacted in 2000, specifically provides that "a signature, contract, or other record relating to [any transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form," and "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." 15 U.S.C. § 7001(a). Because state law typically governs contract interpretation, forty-seven states, as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, have adopted some format of the Uniform Electronic Transactions Act ("UETA"), which provides a basis for the enforceability of electronic signatures at the state law level. The three states, Illinois, New York and Washington, that have not adopted the UETA, have statutes pertaining to electronic transactions. Similar to E-Sign, the UETA prevents a contract, signature, or record from being denied legal effect or enforceability solely because it is in electronic form. In order for UETA to apply, each party to the transaction must have consented to conduct the transaction by electronic means. E-Sign does not expressly require consent, but it does provide that a party cannot be required to use or accept an electronic signature. So long as the parties have agreed to conduct business using electronic signatures, whether explicitly or implicitly, as determined by the parties conduct, an electronic signature is valid and binding.

Benefits of Using Electronic Signatures

There are numerous benefits to using electronic signatures in retail real estate transactions:

- **Reduced Costs.** While the purchase of software capable of creating electronic signatures may require an initial investment, long-term cost savings should far outweigh that cost. Electronic signatures eliminate or reduce costs associated with printing of documents, as well as postage or overnight mail charges incurred to send executables back and forth between the parties. Administrative costs are also reduced because attorneys, paralegals, or office staff do not have to spend time printing and preparing the hard copy executables for mailing.
- **Improved Efficiency and Turnaround Time.** Paper documents must be sent from one party to another and back again, resulting in days or even weeks before the documents have been circulated to all parties. The use of electronic signatures allows the parties to sign the documents simultaneously from wherever they may be in the world. This significant reduction in turnaround time not only creates cost efficiencies, but it can also speed up the timeline for other activities related to the transaction, such as commencement of construction.
- **Record Retention.** Documents signed via an electronic signature can be easily stored for future reference on the parties' computers or internal storage systems, eliminating the need for physical files.
- **Environmental Impact.** The use of electronic signatures reduces the amount of paper generated from printing and mailing the documents.

Considerations When Using Electronic Signatures

A landlord or tenant seeking to adopt a practice of using electronic signatures, or considering whether to accept another party's request to use electronic signatures, should investigate the quality of security methods used by the electronic signature software provider. Software providers provide varying levels of authentication, and some provide other security measures such as audit trails and digital sealing, which prevents a document from being edited or tampered with following execution. The software provider should also have a privacy policy that addresses how they may use the content in your account or in your documents. Those drafting or negotiating the transaction documents should also make sure that documents reference the parties' consent to the use of electronic signatures, so that there will not be a question as to the enforceability of the electronic signature. The use of electronic signatures in your retail real estate transactions can result in significant cost reduction and improved efficiency.

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