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INFORMATION MEMO
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You've Got Acceptance! First Department Holds That Email Containing Attorney's Signature Block Constitutes a Signed Settlement

Email communication between attorneys has been the norm for some time now, but courts are still grappling with circumstances when an email constitutes an offer or acceptance of a settlement agreement. A recent First Department Appellate Division decision, *Philadelphia Insurance Indemnity Co. v. Kendall,* 2021 NY Slip Op 04284, *3 (2021), has updated previous precedent by holding that an email accepting a settlement offer containing an attorney's signature block constituted binding acceptance of a settlement offer.

Kendall involved a car accident where the plaintiff made a claim under the Supplementary Underinsured Motorist benefit provision in her employer's automobile policy. The parties arbitrated the issue and attempted to settle the claim before, during and after the arbitration. The arbitrator sent the parties' her decision, but the decision did not immediately reach the parties and they continued to negotiate settlement, unaware that the arbitrator had issued a decision.

Three days after the arbitrator's decision, the parties reached a settlement and plaintiff's counsel emailed defendant the following, "Confirmed – we are settled for 400K." This email was followed by counsel's name and contact information. Defendant's counsel followed up shortly thereafter with a release agreement for plaintiff to sign. Before plaintiff signed the release agreement, defendant's counsel received the arbitrator's decision, which was for $975,000 — significantly higher than the settlement offer. Defendant sought to vacate the arbitrator's award and enforce the settlement agreement. The Supreme Court denied this relief, finding that plaintiff's attorney did not subscribe his email per CPLR 2104 by "retyping his name in addition to his prepopulated contact information block."

The First Department reversed, holding that "the transmission of an email, and not whether an email 'signature' can be shown to be retyped, is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104." CPLR 2104 states in pertinent part that "[a]n agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." The First Department differentiated *Parma Tile Mosaic*, a case where the Court of Appeals found that a "preprogrammed name on a fax transmission did not fulfill the subscription requirement," because, in effect, email communications have superseded fax transmissions as "the norm" and because of new statutes have been passed since that decision, which further govern the use of electronic signatures.

In reaching its decision, the First Department recognized the "needless formality" between prepopulated and retyped signatures. The court explained that "the fact that the email was sent" was the best indication of whether the parties intended to reach a settlement. The court noted it relied in part on a New York's Electronic Signatures and Records Act that permits electronic signatures in lieu of handwritten

signatures. Therefore, "if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature." This effectively creates a bright line rule to avoid any question whether the signature was typed or prepopulated.

The First Department also acknowledged this decision differed from the Second Department's precedent regarding whether an attorney's "purposefully add[ing]" or "automatically generate[d]" signature makes a material difference under the CPLR. The most recent Second Department case on this issue, *Forcelli v. Gelco Corp.*, 972 N.Y.S.2d 570 (2d Dep't 2013), found that counsel's "email containing her printed name at the end thereof supported the conclusion that she effectively signed the email message" since the name appeared differently than the auto-generated name, consistent with the First Department's previous position on this issue. The Fourth Department, also in a recent decision, appeared inclined to follow the Second Department on enforcing settlements where an attorney types, rather than prepopulates her signature. See *Field v. Pet Haven, Inc.*, No. 20-01120, 2021 WL 3012224, at *1 (4th Dep't Jul. 16, 2021) (enforcing settlement where plaintiff's counsel "explicitly typed his name at the end of the email in a manner akin to a hand-signed letter").

While the First Department also noted that there could be issues around authentication of an email due to hacking or inadvertent sending, it left those issues for future cases. This decision is instructive and an important reminder to counsel to always be very clear and concise when discussing settlement terms over email. Attorneys should be aware that once they state they agree to the terms of a settlement, their clients will be bound and therefore the terms should be as clear, concise and certain as possible.

If you have any questions about this information memo, please contact Laura A. Myers, any attorney in our Litigation practice, or the attorney in the firm with whom you are regularly in contact.