

Sign at the DM: the enforceability of text message agreements

(August 4, 2021) - Anthony Dreyer of Skadden discusses the developing case law on the enforceability of agreements via text messages, direct messages and instant messages as informal means of communication become more common in business transactions.

As with most technological shifts, the emergence of text messages and direct messages (DMs) for business and personal matters has raised numerous novel legal issues. One that has recently emerged is the question of whether "agreements" reached over text message or DM are legally enforceable, both generally, and under state Statutes of Frauds.

This article examines the enforceability of agreements via text message, DM, and instant message (IM). Although this area of the law is still developing, some courts have found agreements entered through these mediums to be enforceable, extending reasoning from cases involving email messages. This trend is likely to gain traction as these informal means of communication become more commonplace in business transactions.

In addition to exploring the existing case law, this article will highlight some of the key considerations that courts are likely to review in making this determination, such as the applicability of the Statute of Frauds and how standard contract formation requirements can be met when entering into an agreement in these non-traditional methods.

How courts have ruled

Five basic requirements form the bedrock of every contractual agreement: (1) an offer; (2) acceptance of the offer; (3) consideration; (4) mutual assent; and (5) an intent to be bound. [22 N.Y. Jur. 2d Contracts § 9](#). The traditional rules of contract also require agreements to contain recitations of the parties, the subject matter, the terms and conditions, and the price or consideration to be paid — although, in some circumstances, statutes such as the Uniform Commercial Code provide "default" terms where a contract is silent on terms such as price. [N.Y. U.C.C. Law § 2-305–310](#). These foundations have for decades been applied to written and oral contracts between parties, but the case law concerning the application of these basic principles in non-traditional mediums and thus the enforceability of those agreements is limited.

However, some precedent has emerged as more courts begin to consider the issue. In one particularly relevant decision, a New York State court found a text message agreement between a landlord and a tenant to be an enforceable contract. *Karaduman v. Grover* (Ithaca City Ct. 2019).

Upon signing a lease and taking possession of the apartment, the tenant found the premises to be defective. After agreeing over text message to refund the tenant as an accord and satisfaction, thereby settling the rights of the parties as to the lease, the landlord reneged on his promise and attempted to avoid repayment. Ruling in favor of the tenant, the court extended reasoning from decisions ruling that email agreements are valid and enforceable, holding that "[t]ext messages are recognized by courts as having the import of letters and emails." Thus, the tenant had the right to rely on the accord reached by the parties.

Similarly, a Massachusetts state court denied a defendant's motion to dismiss and upheld the validity of a **contract** for a sale of land based on **text messages** exchanged between the parties' brokers, finding that the course of messaging between the two signified an intent to be legally bound. *St. John's Holdings LLC v. Two Elecs., LLC* (Mass. Land Ct. 2016). Noting that it was a novel issue in the state, the court held that as long as the text messages contained all essential terms, "writings of relative informality and brevity" can constitute a valid and enforceable agreement.

In other similar circumstances where the parties arrived at an objective agreement via text message, courts have likewise been inclined to enforce the agreements. In one noteworthy case, a court bound the parties to an agreement to arbitrate where the defendant sent the plaintiff the proposed agreement via text message and the plaintiff simply replied "Agree." *Starace v. Lexington L. Firm*, (E.D. Cal. 2019)

Agreements formed via instant messaging seem to be viewed similarly to text messages. For example, the First Department in New York's Appellate Division considered the legitimacy of an alleged agreement entered into over instant message for the purchase of stock. Affirming the lower court's grant of summary judgment for the defendants, the court held that the messages did not create an enforceable agreement — but only because the messages indicated that any agreement was subject to agreed-upon language and receipt of further documentation, thus reflecting "an intent not to be bound" by the IM exchange. *Luxor Cap. Grp., L.P. v. Seaport Grp. LLC* (N.Y. App. Div. 2017).

In the same vein, New York courts that have resisted findings of enforceability through informal text message correspondence seem to focus on the lack of a full and comprehensive agreement encompassing all material terms, rather than any issues with the medium itself.

While the general trend of enforcement appears to not have yet been extended to DMs over social media platforms, it seems likely that a court considering this issue would find obligations entered into through those mediums to be similarly enforceable if the basic elements of formation are present.

How do you 'sign' a text to satisfy the Statute of Frauds?

In addition to general issues of enforceability, certain agreements must also satisfy the Statute of Frauds to be enforceable. Statutes of Frauds are state laws dictating that certain contracts, such as agreements for the sale of real property or those of a certain duration, must be in the form of a signed writing to be given effect. *E.g.*, [N.Y. Gen. Oblig. Law § 5-701–703](#).

Although the language of these statutes might suggest that "signed writing" refers only to a piece of parchment signed in quill pen, courts have embraced a more flexible definition of "signature" in the electronic age. In general, courts will consider whether a party has demonstrated an "intent to authenticate the message," typically by affixing a typewritten signature. *CUnet, LLC v. Quad Partners, LLC* (S.D.N.Y. 2017). And though some states have statutorily excluded text messages and IMs from the definition of "signed writings," *e.g.*, [Cal. Civ. Code. § 1624\(d\)](#), courts in other states have given such agreements full force.

For example, in *St. John's Holdings*, discussed *supra*, the Land Court of Massachusetts found that the requirements of the Statute of Frauds were satisfied based on the text messages exchanged between the parties' brokers. The court reasoned that the parties deliberately signified an intent to be bound by adding a typewritten signature to texts addressing the material terms of the agreement, while omitting the signature for texts that were more informal.

The ruling also indicates that the "writing" need not be singular – a series of text messages or emails may constitute a Statute of Frauds-compliant agreement, provided all essential terms are collectively included in the communications and the signature requirement is met. Conversely, multiple communications that cannot be "reliably read to constitute an integrated agreement bearing definite terms" will not be enforced by a court, no matter how many of the texts or emails have signatures affixed. *Truman v. Brown*, (S.D.N.Y. 2020).

What's next?

At first blush, it may be a bit concerning that courts have demonstrated a willingness to find enforceable agreements in seemingly informal communications. However, simple precautions can help parties ensure that their intentions are never misunderstood when conducting a business transaction through a non-traditional medium.

First, a party who is discussing a potential agreement over text or IM but is not yet ready to be bound to the terms should indicate that any agreement is "subject to contract." This language signifies the parties' understanding that the deal is still in its preliminary stages, and therefore any purportedly agreed-upon terms are not yet enforceable. Alternatively, parties who *do* intend to create a finalized agreement via text or IM should take care to preserve the relevant texts or other documentation in case the other party does not perform their end of the bargain, since these communications are more ephemeral and can easily be inadvertently deleted.

As businesses continue to integrate smartphones and social media into their dealings, the trends outlined above seem certain to continue — and this area of law is likely to see much more attention as non-traditional agreements become commonplace. While we expect the current trend of enforceability to continue, at some point courts may need to consider whether there is a level of informality that precludes enforceability, regardless of the intent of the parties.

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