You Better Think Before You Hit The Send Button On Your Next Email!

We are all familiar with the requirement that a contract for the sale of real estate must be in writing to be enforceable. This requirement arises from a law called the “Statute of Frauds” which has been enacted in most states, in various forms, and provides that certain types of contracts are required by law to be in writing to be enforceable. The types of contracts generally included are contracts involving interests in land, contracts that cannot by their terms be performed within one year from the date of formation, promises to answer for the debt of another, promises made in consideration of marriage and contract (over a certain, stipulated amount) under the Uniform Commercial Code for the sale of goods.

The Maryland Statute of Frauds provision relating to real estate contracts (§5-104 of the Real Property Article, Annotated Code of Maryland) states:

“No action may be brought on any contract for the sale or disposition of land or of any interest in or concerning land unless the contract on which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him.”

The D. C. Statute of Frauds (§ 28-3502) provides, in relevant part, as follows:

“An action may not be brought to . . . charge a person upon . . . a contract or sale of real estate, [or] of any interest in or concerning it . . . unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing . . . and signed by the party to be charged therewith or a person authorized by him.”

In light of the recent proliferation in electronic communication (e-mail in particular) litigation has occurred in several states on the issue of whether an e-mail, sent by a party to a transaction or that party’s agent, can unwittingly satisfy the requirements of a “written agreement” and result in the formation of a contract between the parties.

Examples of cases in which emails have resulted in a finding that an agreement was formed that satisfied the statute of frauds can be found in cases decided in New York and Massachusetts in which the courts held that e-mails sent by parties or their agents in connection with a real estate sale, upon which the defendant had typed his name or which contained a salutation consisting of the defendant’s name, satisfied the requirements of the statute of frauds and resulted in the formation of a contract.

As a result of these developments parties to real estate transactions and their agents may want to consider including, in any e-mail communications transmitting an offer, counteroffer, term sheet, contract, lease or other real estate related communication, an appropriate disclaimer to the effect that the e-mail in question may not form the basis of a binding agreement unless and until incorporated into a separate, mutually acceptable, written agreement signed by the parties. If a broker or agent is initiating or transmitting the e-mail, they may also want to include a statement that the broker or agent has no authority to bind their client and any terms must be incorporated into a separate, written agreement signed by their client to be enforceable.