

Opinion

Question: You have requested my opinion regarding the possible consequences if an original contract, such as an installation agreement or an agreement for services, can not be located but the general content of the agreement is identifiable through other possible means such as a computer data base?

Assumptions: This opinion is based on Michigan Law and is a general opinion not based on particular facts or circumstances. This opinion should not be applied to specific circumstances without obtaining professional advice for each such event.

The State of Michigan follows a uniform series of statutes, case law and rules of evidence relative to the enforcement and admissibility of an original document. The distinction between enforcement and admissibility is significant under the scenario you present. When a consumer executes a form contract for purchase of goods or for services where the contract could be altered by the consumer or the sales person (ie: contains a provision for "additional comments" such as services at no charge for one year) the original contract is required to enforce the contract against the consumer. The issue of enforcement is generally governed by case law which holds that when a document is not ambiguous in it's terms and conditions, no other evidence (parol evidence) may be offered as to the terms and conditions of the contract. A perfect example of parol evidence would be the content of a data base or summary sheet which purports to contain portions or all of the content of the original contract. A consumer such as a homeowner would have a very good defense in a collection action if the original contract bearing the consumer's signature could not be located but was known to be in existence somewhere.

The more difficult question arises if third parties such as a dealer acting as the sales person and a central station providing monitoring services are also relying on the existence of the original contract executed by the homeowner. Any attempted enforcement action between the dealer and the central station would rest on the admissibility of the original contract. Michigan Court Rule 1001 (3) provides: "An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by the person executing or issuing it. Michigan Court Rule 1004 addresses the admissibility of other evidence of the content of documents. It states: "The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

- (1) All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) No original can be obtained by any available judicial process or procedure; or
- (3) At a time when an original was under control of the party against whom it is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at hearing, and that party does not produce the original at hearing.

The location of the original document becomes critical to the proponent attempting to admit the existence of the document. Imagine a circumstance where a dealer executes a contract for services with a consumer and the dealer actually keeps the original contract. The dealer now enters into an agreement with a central station for services relating to that same contract (for monitoring or for financing the account). If the consumer breaches the contract (ie: stops making payments or switches services in breach of the contract), the dealer and the central station find themselves in a difficult situation. The central station may attempt to claim an off-set against the dealer for early termination of an account but the central station has not actually taken possession of the consumer contract which now can not be located by the dealer. Presuming the original was simply lost in the course of business and not “lost in bad faith” the central station, as the proponent of a claim of set-off against the dealer, can not prove it’s alleged damages without the original consumer contract. Similarly, if the dealer is in possession of the original customer contract and wants to enforce its terms relative to the central station (for either monitoring or for finance) but can’t locate the document, now the dealer, as proponent, can’t go forward with the enforcement without the original consumer contract.

As a practical matter in scenarios such as this, no party wants to be charged with being in possession of, and therefor responsible for, the original consumer contract. However, depending on whether a party will be a successful proponent of an action rests heavily on the location and accessibility of the original contract. Another possible solution exists to resolve these issues and that solution lies in the Records Reproduction Act for the State of Michigan. Again, this Act is very nearly uniform in the States, however, it’s presence should be verified outside the State of Michigan before relying on this opinion.

In addition to the Court Rules cited above the State of Michigan clearly defined what requirements a governmental authority was required to follow to use a digital imaging solution to store and reproduce digital images in the Optical Imaging Systems Rules. (Rule 24.401, et seq). In 2005 the State enacted the Records Reproduction Act which clarified the application of those rules and regulations. That Act provides in relevant part:

A record reproduced under this act shall have the same force and effect as a true paper copy of a record. All copies produced under this act, when certified as true by the officer in whose office the original was filed or recorded, shall have the same force and effect as an original for all legal purposes and is admissible in court, administrative proceedings, and elsewhere as evidence in the same manner as an original.

MCL 24.406

Further the State of Michigan acknowledged that this statute was not limited to governmental authority when it came to the validity of a properly implemented imaging solution.

With respect to a reproduction created by a person other than a governmental entity or a governmental official acting in his or her official capacity, a law that references this act incorporates by reference any reproduction method or medium approved by this act.

MCL 24.403

These state statutes follow the federal guidelines of the Uniform Electronic Transaction Act (UETA) and the Electronic Signatures in Global and National Commerce Act (E-Sign) as established by federal law. The reader could reasonably expect to find similar state statutes at all levels.

So what is the conclusion? In the State of Michigan a digital image, whether created by scanning or other means of creation, if created in keeping with standards established by the Rules for Optical Imaging Systems, is admissible “as evidence in the same manner as the original” by virtue of Records Reproduction Act as cited herein. The simple matter of uploading an image of a customer contract in compliance with these rules eliminates all of the issues raised in this opinion as to both enforcement and admissibility of that document. In the same manner it eliminates the responsibility for any party to actually possess or produce “the original”. Finally, assuming implementation of a proper records destruction policy, this process further greatly reduces the possibility of identity theft and the resulting penalties associated with those rules and regulations by allowing the elimination of the original and the necessity to copy or fax the original document.

You have also requested that I review your system and service relative to compliance with the Statutes cited in this Opinion. In reviewing the system and service, I took into account both, the software and hardware configurations as well as the policies and procedures implemented to insure security, privacy and access. I reviewed your internal policies controlling access to data, as well as, the written policies and procedures to assure those guidelines are enforced. Lastly, I reviewed the policies and procedures recommended to customers who utilize your system and service. Having so reviewed the system and service it is my opinion that the service overall is compliant with the Records Reproduction Act and the Rules for Optical Imaging System. Further, I find the system and service compliant with both UTEA and E-Sign as those acts apply to records retention and destruction for optical and electronic data.

In rendering this portion of my opinion I also reviewed a typical contract your company may offer to a potential customer. I compliment you in that your contract states in part “ . . . DPS Document Records Management System believes said image to be an original document”. However, Subscriber further understands that DPS Document Records Management System is not the trier of fact, nor determiner of law as to the originality of any document converted to a storage media.” While the system and service I reviewed is compliant as stated herein, customers are well served to consider the requirements for records retention and destruction for their own industries. I also note that you provide consulting services and directions for customers to make such inquires.

Thank you for allowing me to review your service.

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