

Assembly Bill No. 2136

CHAPTER 107

An act to amend Section 10148 of the Business and Professions Code, and to amend Section 1624 of the Civil Code, relating to contracts.

[Approved by Governor July 9, 2014. Filed with Secretary of State July 9, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2136, Daly. Contracts: statute of frauds.

Existing law prescribes the manner in which contracts may be created. Under existing law, certain contracts are invalid unless the contract, or some note or memorandum of the contract, is in writing and subscribed by the party to be charged. Under existing law, an agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract, as defined, and there is sufficient evidence to indicate that a contract has been made, including, among other alternatives, a written confirmation or the parties have agreed by some other means to be bound by the terms of the qualified financial contract from the time they reached agreement on those terms.

This bill would provide that an electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, such as a text message or an instant message, is insufficient to constitute a contract to convey real property, in the absence of a written confirmation that conforms to a specified requirement of existing law.

Existing law requires a licensed real estate broker to retain for 3 years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required.

This bill would prohibit this requirement from being construed to require retention of electronic messages of an ephemeral nature, as described in the bill.

The people of the State of California do enact as follows:

SECTION 1. Section 10148 of the Business and Professions Code is amended to read:

10148. (a) A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other

documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required. The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature. This subdivision shall not be construed to require a licensed real estate broker to retain electronic messages of an ephemeral nature, as described in subdivision (d) of Section 1624 of the Civil Code.

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

(d) The commissioner may maintain an action for the recovery of the cost of an audit in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

(e) The bureau may suspend or revoke the license of any real estate broker, real estate salesperson, or corporation licensed as a real estate broker, if the real estate broker, real estate salesperson, or any director, officer, employee, or agent of the corporation licensed as a real estate broker knowingly destroys, alters, conceals, mutilates, or falsifies any of the books, papers, writings, documents, or tangible objects that are required to be maintained by this section or that have been sought in connection with an investigation, audit, or examination of a real estate licensee by the commissioner.

SEC. 2. Section 1624 of the Civil Code is amended to read:

1624. (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars (\$100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

(b) Notwithstanding paragraph (1) of subdivision (a):

(1) An agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract as defined in paragraph (2) and one of the following apply:

(A) There is, as provided in paragraph (3), sufficient evidence to indicate that a contract has been made.

(B) The parties thereto by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

(2) For purposes of this subdivision, a “qualified financial contract” means an agreement as to which each party thereto is other than a natural person and that is any of the following:

(A) For the purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metals on a forward, spot, next-day value or other basis.

(B) A contract (other than a contract for the purchase of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade) for the purchase, sale, or transfer of any commodity or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of a dealing in the forward contract trade, or any product

or byproduct thereof, with a maturity date more than two days after the date the contract is entered into.

(C) For the purchase and sale of currency, or interbank deposits denominated in United States dollars.

(D) For a currency option, currency swap, or cross-currency rate swap.

(E) For a commodity swap or a commodity option (other than an option contract traded on, or subject to the rules of, a contract market or board of trade).

(F) For a rate swap, basis swap, forward rate transaction, or an interest rate option.

(G) For a security-index swap or option, or a security or securities price swap or option.

(H) An agreement that involves any other similar transaction relating to a price or index (including, without limitation, any transaction or agreement involving any combination of the foregoing, any cap, floor, collar, or similar transaction with respect to a rate, commodity price, commodity index, security or securities price, security index, other price index, or loan price).

(I) An option with respect to any of the foregoing.

(3) There is sufficient evidence that a contract has been made in any of the following circumstances:

(A) There is evidence of an electronic communication (including, without limitation, the recording of a telephone call or the tangible written text produced by computer retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in the communication a contract was made between the parties.

(B) A confirmation in writing sufficient to indicate that a contract has been made between the parties and sufficient against the sender is received by the party against whom enforcement is sought no later than the fifth business day after the contract is made (or any other period of time that the parties may agree in writing) and the sender does not receive, on or before the third business day after receipt (or the other period of time that the parties may agree in writing), written objection to a material term of the confirmation. For purposes of this subparagraph, a confirmation or an objection thereto is received at the time there has been an actual receipt by an individual responsible for the transaction or, if earlier, at the time there has been constructive receipt, which is the time actual receipt by that individual would have occurred if the receiving party, as an organization, had exercised reasonable diligence. For the purposes of this subparagraph, a “business day” is a day on which both parties are open and transacting business of the kind involved in that qualified financial contract that is the subject of confirmation.

(C) The party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made.

(D) There is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker.

For purposes of this paragraph, evidence of an electronic communication indicating the making in that communication of a contract, or a confirmation, admission, note, memorandum, or writing is not insufficient because it omits or incorrectly states one or more material terms agreed upon, as long as the evidence provides a reasonable basis for concluding that a contract was made.

(4) For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval, or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing, and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing. The confirmation and notice of objection referred to in subparagraph (B) of paragraph (3) may be communicated by means of telex, telefacsimile, computer, or other similar process by which electronic signals are transmitted by telephone or otherwise, provided that a party claiming to have communicated in that manner shall, unless the parties have otherwise agreed in writing, have the burden of establishing actual or constructive receipt by the other party as set forth in subparagraph (B) of paragraph (3).

(c) This section does not apply to leases subject to Division 10 (commencing with Section 10101) of the Commercial Code.

(d) An electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, including, but not limited to, a text message or instant message format communication, is insufficient under this title to constitute a contract to convey real property, in the absence of a written confirmation that conforms to the requirements of subparagraph (B) of paragraph (3) of subdivision (b).