

**ARTICLE:  
AMENDMENT TO STATUTE OF FRAUDS SEEKS TO  
CLARIFY ROLE OF “EPHEMERAL” ELECTRONIC  
COMMUNICATIONS IN REAL ESTATE  
TRANSACTIONS**

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With the passage of Assembly Bill 2136, the California legislature has imposed new limits on parties' ability to rely on so-called ephemeral electronic communications in the creation of binding contracts for the sale of real property. Through an amendment to the Statute of Frauds that took effect on January 1, 2015, AB 2136 provides that an electronic message of an ephemeral nature that is not intended to be retained or to create a permanent record, such as a text message or instant message, is not sufficient, without separate written confirmation, to create a contract to convey real property.

**EXISTING LAW:**

Under the Statute of Frauds,<sup>1</sup> certain types of contracts are not enforceable unless they are memorialized in some note, memorandum, or other writing that is subscribed by the party to be charged or by his or her agent. Among the contracts subject to this restriction are agreements that are not to be fully performed within one year, leases exceeding one year, and conveyances of interests in real property.<sup>2</sup>

Despite this general rule, the modern trend in the law favors carrying out parties' intentions by enforcing agreements where it appears they actually intended to make a contract. In California, this has led to the adoption, both in the courts and the legislature, of a more inclusive and flexible approach to contract formation generally and to the application of the requirements of the Statute of Frauds.<sup>3</sup> Also, the enactment of the California Uniform Electronic Transaction Act made clear that an electronic record or signature is legally the equivalent of a written record or signature and that where a specific law, such as the Statute of Frauds, requires a writing, an electronic record satisfies that requirement.<sup>4</sup> As a result, the scope of what can constitute an ad-

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equate writing and an adequate signature on that writing to satisfy the Statute of Frauds has become quite broad. For example, in a breach of contract action, an email that purportedly recited all the terms of an agreement reached verbally between the plaintiff and the defendant during a face-to-face meeting was found by a federal Court of Appeals to satisfy the California Statute of Frauds.<sup>5</sup>

As technology has evolved and the various methods of communicating electronically have proliferated, however, this has created uncertainty as to how far the boundaries of the Statute of Frauds can be pushed and at what point, if any, an otherwise written form of communication becomes too short, abbreviated, ephemeral, or informal to meet the minimum requirements of the Statute of Frauds.

#### **CHANGES UNDER AB 2156:**

In order to resolve some of the ambiguity presented by existing law, at least in the context of real estate transactions, AB 2236 adds a new subsection to the Statute of Frauds (Civ. Code, § 1624), that reads as follows:

(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).<sup>6</sup>

Subparagraph (B) of paragraph (3) of subdivision (b), in turn, provides that sufficient evidence that a contract has been made exists for purposes of the Statute of Frauds where:

[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 (of the other period of time that the parties may agree in writing), written objection to a material term of the confirmation.<sup>7</sup>

Thus, in light of AB 2136, any communication delivered via text, tweet, instant message, or other short-lived electronic communication,

is insufficient for purposes of creating an enforceable contract for the conveyance of real property unless: (i) the party against whom enforcement is being sought has provided the other party with a written confirmation of the purported contract within five business days after the date of the subject ephemeral communication; and (ii) the party receiving such written confirmation does not provide the sending party with a written objection within three business days after the date of its receipt of the confirmation.

Because of these changes, the types of ephemeral communications covered by AB 2136 are now treated similarly to oral agreements regarding matters that fall within the purview of the Statute of Frauds. While they are not sufficient to create an enforceable contract in the absence of other confirming writings or actions, these electronic communications are also not wholly immaterial and they can result in enforceable contracts under certain circumstances.

However, while AB 2136's change to the Statute of Frauds adds some clarity with respect to one ambiguity in the law, it unfortunately also raises several new questions. For example, it remains unclear what exactly the requirements are for an adequate writing under subdivision 1624(b)(3)(B) and what role, if any, the ephemeral communications addressed by AB 2136 can play with respect to such confirmation. Under subdivision (4) of Section 1624(b), the written confirmation and the written objection contemplated in subdivision (3)(B) may be communicated via facsimile, computer, or other similar process by which electronic "signals are transmitted by telephone or otherwise," provided that the party using such electronic communication has the burden of proving actual or constructive receipt by the other party.<sup>8</sup> Based on this language, it seems clear that an email would suffice as a writing for purposes of subdivision (3)(B), however, the reference to "signals transmitted by telephone or otherwise" would seem to also extend to communications such as text messages and instant messages and, thus, it leaves open the question of whether a text message is an adequate writing to satisfy this requirement (assuming it contains terms and language adequate to "indicate that a contract has been made").

Additionally, the Civil Code does not provide a clear answer to the

question of whether the confirmation contemplated in subdivision (3)(B) must include a signature adequate to satisfy the signature requirement of the Statute of Frauds. Because the language of subsection (3)(B) does not expressly mention signatures and that subsection is part of a list of other exceptions to the Statute of Frauds that includes a provision that does expressly include a signature requirement,<sup>9</sup> it appears that the legislature did not intend for such written confirmation to require a signature. This interpretation has not, however, been tested in the courts.

### **CONCLUSION:**

AB 2136 was originally introduced at the behest of the California Association of Realtors as part of a larger effort to clarify and modernize the obligations of real estate brokers with respect to records retention.<sup>10</sup> Thus, in addition to the above described amendment to the Statute of Frauds, AB 2136 also amended the Business and Professions Code to make clear that provisions of the section requiring brokers to retain transaction related documents and records for three years do not apply to ephemeral communications like texts and instant messages.<sup>11</sup>

However, despite this limited initial purpose, the changes to the Statute of Frauds enacted by AB 2136 reach beyond the residential area and could potentially impact buyers and sellers of commercial properties, landlords and tenants, and even banks and other lenders in their dealings with REO properties. Therefore, all such parties, whether they are seeking to create a contract or intend to avoid the formation of a binding agreement (such as in the case of parties' negotiating a non-binding memorandum of understanding or term sheet), should keep these new limitations in mind and institute practices to make sure that when they send or receive such ephemeral communications during the course of negotiating a deal, they timely take the steps necessary to properly confirm or refute, as the case may be, the content of those communications. Also, because of the remaining open questions discussed above, when sending any such confirmations and/or objections, parties should err on the side of caution and, when possible, include signatures on those communications and transmit

them via a means that is known to suffice as a writing for the Statute of Frauds, such as by actual written letter or facsimile.

**ENDNOTES:**

<sup>1</sup>Civ. Code, § 1624.

<sup>2</sup>Civ. Code, § 1624, subd. (a)(1) and (a)(3).

<sup>3</sup>See, e.g. *Okun v. Morton*, 203 Cal. App. 3d 805, 250 Cal. Rptr. 220 (2d Dist. 1988).

<sup>4</sup>Civ. Code, § 1633.7.

<sup>5</sup>*Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005).

<sup>6</sup>Civ. Code, § 1624, subd. (d).

<sup>7</sup>Civ. Code, § 1624, subd. (b)(3)(B).

<sup>8</sup>Civ. Code, § 1625, subd. (b)(4).

<sup>9</sup>Civ. Code, § 1624, subd. (b)(3)(D).

<sup>10</sup>Proposed Consent of the Assembly Committee on Judiciary, May 6, 2014. Copy available online at: <http://www.legislature.ca.gov/cgi-bin/port-postquery>.

<sup>11</sup>Bus. & Prof. Code, § 10148.