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PERSPECTIVE

Can texts be 'writings' under the statute of frauds?

By Robert C. Barnes

The statute of frauds is a venerable doctrine in real estate law, requiring most real estate contracts to be in writing. But in an age of tweets, texts and instant messages, do such informal communications qualify as "writings"?

The California Legislature attempted to answer that question with Assembly Bill 2136, which took effect Jan. 1 this year. It provides that "ephemeral" electronic communications, such as text messages and IMs, don't satisfy the statute's requirements for writings — meaning a contract reached using those kinds of communications may not be enforceable.

California's version of the statute of frauds has been around since 1872. The heart of the statute is codified in Civil Code Section 1624, but elements of it show up in other assorted statutes as well. In addition to most real estate contracts, certain other contracts, such as guarantees and certain promissory notes, are also covered by it.

Contracts governed by the statute must be in writing and signed by the party who is being held to the agreement. An agreement that doesn't comply with the statute isn't necessarily void but it can be found to be unenforceable if one party tries to hold the other to its terms. The writing need not be extensive (a written note or memorandum will do), but it must contain the fundamental elements of a contract — identifying the subject matter, indicating that a contract has been made and containing the basic terms of the parties' agreement.

Over time, California courts have allowed increasingly greater leeway to the rule in both what makes a writing and how it must be signed. Covered writings have grown to include telex, fax and email, the latter thanks to the Uniform Electronic Transactions Act. But the advent of text messages, IMs and tweets tested the boundaries of a writing with their informality and intentionally fleeting nature.

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These new forms of communication presented a particular conundrum for California real estate brokers. Licensed real estate brokers must retain for three years copies of listings, trust records, canceled checks and other documents signed or obtained by the broker in matters where a broker's license is required.

Under the Uniform Electronic Transactions Act, those communications include emails. But texts and IMs are a different sort of communication: They are, to quote AB 2136, "ephemeral" and not easily stored and preserved. Of course, they are also hugely popular and are used every day in real estate deals as well as private correspondence.

The problem — both technical and legal — led the California Association of Realtors to propose AB 2136. The legislation accomplished two goals. First, it expressly excluded from brokers' obligations to retain "electronic records of an ephemeral nature," specifically referring to text and IMs. (Although this means that brokers no longer need to retain paper copies of texts and IMs to comply with the law, some brokers may still want to do so as part of a careful risk management practice.)

AB 2136 also amended the statute of frauds to exclude from its scope an ephemeral electronic message "that is not designed to be retained or to create a permanent record" — again, with specific reference to texts and IMs.

Interestingly, the legislation only states that texts and IMs are insufficient to constitute a contract to convey real property. Does this imply that they may be OK for other contract purposes under the statute? It's doubtful, but the legislation isn't clear and no court has ruled on the question.

With the enactment of AB 2136, a prudent buyer, seller or broker won't take a chance using texts or IMs to document a real estate transaction. However, if a deal is struck that way AB 2136 allows a party to use an existing safe harbor mechanism for oral agreements: The sender can send to the other party written confirmation of the oral (or messaged) contract within five business days after the contract is made.

If the sender doesn't receive the other party's written objection to the contract within three business days after receipt of the sender's notice, then there would be sufficient evidence that a contract has been made.

Note that the confirming sender must establish receipt of written notice by the other party for the confirmation process to be effective. Although notice can be given by an array of methods, including email, consider using a method for which receipt can be easily proven, such as FedEx, if time allows.

This ratification mechanism can be used to confirm or refute a deal — for example, when the parties are negotiating a non-binding letter of intent and want to avoid entering into a binding agreement.

What new technology will present the equivalent of text messaging or IM — a new quick, informal and irresistible way to stay in touch? The language of AB 2136 looks flexible enough to accommodate novel electronic communications methods that by their nature aren't intended to be permanent. But if recent history is any guide, that expectation could prove to be, as they say, ephemeral.

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