

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1345 (Hart)
Version: April 12, 2023
Hearing Date: June 27, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Contracts: Residential Exclusive Listing Agreements Act: prohibition

DIGEST

This bill makes it unlawful: (1) for a residential exclusive listing agreement to last longer than 12 months from the date the agreement was made, and (2) to present for recording or filing, or otherwise attempt to record or file, with a county recorder an exclusive listing agreement of any duration or any memoranda or notice of such an agreement. The bill provides that an exclusive listing agreement in violation of these provisions is void and unenforceable, and a homeowner who entered into any such agreement may retain any consideration received thereunder. The bill makes a violation of these provisions a violation of the Consumer Legal Remedies Act (CLRA).

EXECUTIVE SUMMARY

This bill is in response to a recent predatory practice targeting vulnerable homeowners with offers of upfront cash payments, generally a few hundred dollars, in exchange for entering into 40-year exclusive listing agreement with a real estate company. These agreements have steep penalties for cancellation, often a percentage of the home value. These real estate companies have also begun recording these agreements, essentially creating a lien on the properties, which can cause issues for the homeowner if they attempt to refinance or take a loan out on the home and clouds title to the property. In order to protect California homeowners, this bill (1) makes it unlawful for a residential exclusive listing agreement to last longer than 12 months from the date the agreement was made; (2) makes it unlawful to present for recording or filing, or otherwise attempt to record or file, with a county recorder an exclusive listing agreement of any duration; and (3) makes any exclusive listing agreement that is in violation of these provisions void and unenforceable.

The bill is sponsored by the Attorney General Rob Bonta and supported by the California Land Title Association, the California Mortgage Bankers Association, and the

County of Solano. The bill is opposed by the California Association of Realtors and the Future Listing Purchasers Association.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines “listing agreement” as a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer. (Civ. Code § 2079.13(e).)
- 2) Prohibits a real estate licensee from entering into an exclusive listing agreement for an indefinite time period. (Bus. & Prof. Code § 10176(f).)
- 3) Requires a county recorder to, upon payment of proper fees and taxes, accept for recordation any instrument, paper, or notice that is authorized or required by statute, or court order to be recorded, or authorized or required to be recorded by a local ordinance that relates to the recordation of any instrument, paper, or notice that relates to real property, if the instrument, paper, or notice contains sufficient information to be indexed as provided by statute, meets recording requirements of state statutes and local ordinances, and is photographically reproducible. (Gov. Code § 27201(a)(1)(A).)
- 4) Prohibits a county recorder from refusing to record any instrument, paper, or notice that is authorized or required by statute, court order, or local ordinance that relates to the recordation of any instrument, paper, or notice that relates to real property to be recorded on the basis of its lack of legal sufficiency. (*Ibid.*)
- 5) Establishes the types of unfair methods of competition and unfair or deceptive act or practices undertaken by a person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer. (Civ. Code § 1770.)
- 6) Provides that any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 of the Civil Code may bring an action against that person to recover or obtain any of the following:
 - a) actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000);
 - b) an order enjoining the methods, acts, or practices;
 - c) restitution of property;
 - d) punitive damages;
 - e) court costs and attorney’s fees to a prevailing plaintiff. However, reasonable attorney’s fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff’s prosecution of the action was not in good faith; and

- f) any other relief that the court deems proper. (Civ. Code § 1780(a), (e).)
- 7) Limits the amount of interest that can be charged on a borrower for any loan or forbearance of any money, goods, or things in action if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum, as provided. (Cal. Const. § 1, art. XV.)
 - a) Excludes any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and secured, directly or collaterally, in whole or in part by liens on real property from the interest in the state Constitution. (Civ. Code § 1916.1.)

This bill:

- 1) Defines “exclusive listing agreement” as an exclusive right to list or sell residential real estate, including a contract or agreement to enter into any such agreement or arrangement.
- 2) Makes it unlawful for an exclusive listing agreement to last longer than 12 months from the date the agreement was made.
- 3) Makes it unlawful to present for recording or filing, or otherwise attempt to record or file, with a county recorder an exclusive listing agreement of any duration or any memoranda or notice of such an agreement.
- 4) Provides that an exclusive listing agreement that is made or presented for recording or filing with a county recorder in violation of these provisions is void and unenforceable. A homeowner who entered into any such agreement may retain any consideration received thereunder.
- 5) A violation of this section constitutes a violation under Section 1770 of the Civil Code, the Consumer Legal Remedies Act.

COMMENTS

- 1. Stated need for the bill

The author writes:

At a time when Californians are struggling to make ends meet, predatory practices targeting our most vulnerable communities need urgent action. AB 1345 allows California to prevent more homeowners from entering into these agreements that put their home equity at risk. To deter these predatory and coercive practices, AB 1345 will make it unlawful to have an exclusive listing agreement last longer than 12

months and make it unlawful to record exclusive listing agreements with county recorder offices.

Attorney General Rob Bonta, sponsor of the bill, writes:

California law permits realty companies and residential homeowners to enter into exclusive listing agreements, whereby the real estate agent has the exclusive right to sell the homeowner's property for a set time. Exclusive listing agreements can be beneficial, since they ensure that both parties are committed to working together to sell the owner's home for the duration of the agreement. [...]

Unfortunately, some realty companies are now using exclusive listing agreements in an anticompetitive manner that is harming consumers and other realty companies, and this trend is increasing. The realty companies engaged in these activities typically target vulnerable homeowners, including those who are elderly and low-income, offering to pay cash upfront for the right to sell the home if the homeowner decides to sell in the future. [...]

What the homeowner often does not realize, however, is that the agreement lasts for several decades and will be recorded as a lien against the home, so that it also binds the owner's successors if the owner dies. Because of this lien, homeowners may be unable to refinance or obtain other essential home loans, which can lead to devastating consequences. Should a homeowner wish to cancel the contract or breach the contract, they must often pay many thousands of dollars.

This scheme not only harms homeowners but also the majority of real estate agents, who are not employing these questionable practices. Once a homeowner is locked into a multi-year exclusive listing agreement, other real estate agents are unable to compete for their business. The owner is then stuck with a realty company who may not be working diligently in their best interest, and other real estate agents, prevented from obtaining certain sales through traditional means, may be incentivized to adopt similar, anti-competitive practices to obtain customers.

2. This bill attempts to address predatory practices targeting homeowners

The author states that this bill is in response to a predatory practice that has become recently prevalent where homeowners are offered a cash payment in exchange for entering into 40-year exclusive listing agreement.¹ The amount offered can range from

¹ Rebecca Liebson, *Florida company pays quick cash to list your home. The catch? A 40-year contract*, Tampa Bay Times (Sept. 6, 2022), available at <https://www.tampabay.com/news/real-estate/2022/09/06/florida-company-pays-quick-cash-to-list-your-home-the-catch-a-40-year-contract/>; *I-Team: Rutland Couple Locked Into 40-Year Agreement with Realtor After Signing 'Homeowner Benefit Agreement*,

\$300 to \$5,000. Homeowners are told that there are no requirements to sell the home, but are not made aware of the other contractual obligations. These include a penalty to cancel the contract or use a different real estate agency calculated as a certain percentage of the value of the home. Additionally, these agreements are being recorded essentially acting as a lien on the home. This can cause issues if the homeowner attempts to refinance or takeout a loan on the home. The lien placed on the property also binds the home even after the homeowner's death, leaving their loved ones subject to the contract and potential penalties.

This scheme has been used across the country. The Attorneys General of Florida, Massachusetts, and Pennsylvania have initiated actions against real estate brokerage firm MV Realty for the above described practices accusing them of "scamming" residents into pledging their homes in exchange for small cash payments. Recently, the Federal Communications Commission issued a public notice against MV Realty and PhoneBurner Inc. for "substantial amounts of apparently unlawful telephone solicitation calls".² The Solano County Board of Supervisors, a supporter of this bill, reports to the Committee that the Solano County Recorder's office has been presented with documents for recording these exclusive listing agreements from MV Realty and that they have subsequently learned of this happening in at least 17 California counties.

This bill seeks to curtail this business practice in order to protect California homeowners by prohibiting an exclusive listing agreement from lasting longer than 12 months from the date the agreement was made. Additionally, the bill makes it unlawful to present for recording or filing, or otherwise attempt to record or file, an exclusive listing agreement of any duration with a county recorder, and provides that any such agreement that is made or presented for recording or filing in violation of these provisions is void and unenforceable. Any homeowner who entered into any of these unlawful agreements can keep any consideration they received for entering into them. The bill also makes a violation of its provisions a violation under the CLRA.

The CLRA was enacted "to protect the statute's beneficiaries from deceptive and unfair business practices," and to provide aggrieved consumers with "strong remedial provisions for violations of the statute." (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) Generally speaking, the CLRA is intended "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code Sec. 1760.) Among other things, it prohibits merchants from "representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law," or representing that goods "are of a particular standard, quality, or grade" when they are of another. (Civ. Code Sec. 1770.) Consumers who are harmed by unlawful

CBS News Boston (Mar. 4, 2022), available at <https://www.cbsnews.com/boston/news/iteam-real-estate-homeowner-benefit-agreement-rutland/>.

² Public Notice DA 23-65, Fed. Communications Comm. (Jan. 24, 2023), available at <https://docs.fcc.gov/public/attachments/DA-23-65A1.pdf>.

practices specified in the Act have a right of action under the CLRA to recover damages and other remedies, including actual damages; an order to enjoin the unlawful act; restitution; punitive damages; or any other relief that the court deems proper. (Civ. Code Sec. 1780.) Additionally, the statute authorizes courts to award attorney's fees to prevailing plaintiffs and contains mechanisms for securing remedies on a class wide basis. (Civ. Code Secs. 1780, 1781.) Additionally, consumers who are over the age of 65 or disabled persons are eligible to additionally seek and be awarded, in addition to the above remedies, up to \$5,000 where the trier of fact finds certain circumstances are met. (Civ. Code § 1780(b)(1).)

3. Proposed amendments

In order to clarify that an exclusive listing agreement can be renewed at the end of the initial 12 month period, the author has offered the following amendments.

Amendment 1

On page 3, in line 25, after "(b)" insert:

(1)

Amendment 2

On page 3, in line 25, strike out "agreement" and insert:

Agreement, or renewal of an exclusive listing agreement,

Amendment 3

On page 3, in line 26, after "agreement" insert:

or renewal

Amendment 4

On page 3, below line 26, insert:

(2) An exclusive listing agreement shall not renew automatically, and a renewal of an exclusive listing agreement shall be in writing and be dated and signed by all parties to the agreement.

4. Opposition concerns

The Future Listing Purchasers Association (FLPA), which represents businesses that provide upfront cash payments to consumers for entering into a long-term exclusive listing agreement, write in opposition. They have several concerns with the bill because it would prohibit them from continuing their current business model in this state. Their main argument is that the “objective of this legislation should not be to eliminate the valuable option that homeowners currently have to be compensated for the future listing of their home by a licensed realtor. Instead, California law should permit this option in a regulated manner that safeguards consumers' interests.” They argue that this bill would deprive “California homeowners of a valuable option to be compensated today for the right to list their home with a California-licensed realtor at a future date and at a listing price of their choosing. Currently, traditional realtors acquire this right to list a home for free, without compensating the homeowner. In contrast, FLPA members offer compensation to homeowners for this right.” Further, they note that they share “the goal of enacting legislation to protect homeowners who enter into future listing agreements” and that they would support legislation that included licensure, registration, and bonding requirements for these types of businesses. Additionally, they would support requirements for “clear and easily understandable contracts written in the language of the party entering into the agreement” and that the “front page of the contract should prominently display bold and boxed transparent obligations, along with specific prohibited practices, to ensure consumers' robust protection.” The FLPA states they approached the author’s office with the above amendments, but that the author declined to accept them.

The California Association of Realtors (CAR) are opposed to the bill unless is amended to increase the cap on the duration of exclusive listing agreements to three years. They also want the bill’s provisions limited to persons whose homes are their principal residence. CAR has indicated that they are having productive conversations with the author and stakeholders and are hopeful they can find a path forward.

5. Statements in support

The California Land Title Association and California Mortgage Bankers Association write in support stating:

AB 1345 is vital to stopping an anti-consumer practice that has recently emerged within California, in which certain real estate brokers seek to pay homeowners a nominal up-front fee – usually several hundred dollars – in exchange for the homeowner being obligated to use the broker’s services in the future.

The terms set forth in these agreements are harsh and inure greatly to the benefit of the broker, with the obligations often lasting for as long as 40 years,

and even attempting to bind successor owners by purporting to create an interest in the real property. Further compounding the predatory nature of these agreements, the penalties for violating their terms are excessive – often several percent of a home’s sale price, which could easily be in the thousands, or even tens of thousands, of dollars.[...]

In addition, the act of recording these agreements in property records, as the entities that seek to engage homeowners in these agreements often attempt to do, can create a long-term barrier to the sale or refinancing of real estate or hamper estate administration.

6. Statements in opposition

The California Association of Realtors writes in opposition stating:

Every property is unique and the different circumstances that occur when a property is listed for sale necessitates different listing term lengths. In a hot market, it is likely the length of a listing agreement will be short. In a cooler market, it will likely be longer as a property may take longer to sell and the seller and listing agent may want to include time to do additional repairs or improvements to make the parcel more attractive, if necessary.[...]

While we originally favored an approach like most states that have addressed this problem by limiting only agreements to list, we are agreeing to a cap on the duration of exclusive listing agreements, but are proposing a three-year cap, not one. Additionally, our proposed amendments seek to ensure that the limits placed on the terms of exclusive listing agreements are targeted to protect the victims of these types of schemes, which have been persons and families whose homes are their principal residence. Investors, not surprisingly, have not been the target of these schemes and do not need these additional protections and there are many circumstances where these parties would need greater flexibility in listing agreements and other terms.

We are pleased to report that while we have yet to reach agreement, we are having productive conversations with Assembly Member Hart and stakeholders and are hopeful there is a path forward on this important measure.

SUPPORT

Attorney General Rob Bonta (sponsor)
California Land Title Association
California Mortgage Bankers Association
County of Solano

OPPOSITION

California Association of Realtors
Future Listing Purchasers Association

RELATED LEGISLATION

Pending Legislation: AB 1242 (Wilson, 2023) prohibits a real estate broker from entering into a contract that grants an agent the exclusive right to list or sell in excess of one year. AB 1242 was never set for a hearing in the Assembly Judiciary Committee.

Prior Legislation: None known.

PRIOR VOTES

Assembly Floor (Ayes 64, Noes 1)
Assembly Appropriations Committee (Ayes 13, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)
