AB-1065 Insurance transactions: notice: electronic transmission. (2019-2020)

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Assembly Bill No. 1065

CHAPTER 235

An act to amend and repeal Section 1633.3 of the Civil Code, and to repeal and amend Section 38.6 of the Insurance Code, relating to insurance.

[Approved by Governor September 05, 2019. Filed with Secretary of State September 05, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1065, Berman. Insurance transactions: notice: electronic transmission.

Existing law, the Uniform Electronic Transactions Act, applies to electronic records and electronic signatures of a transaction, and generally prohibits a record or signature from being denied legal effect or enforceability solely because it is in electronic form. Existing law exempts from that act specific transactions. Existing law, commencing January 1, 2021, would exempt specified notices regarding the cancellation, expiration, and replacement of insurance policies from that act.

This bill would instead make those notices subject to the act indefinitely.

Existing law authorizes an insurer to provide notices of insurance transactions by electronic transmission, if the insurer complies with specified requirements, including that the insurer acquires the consent of the person to opt in to receive the notice by electronic transmission. Existing law, commencing on January 1, 2021, excepts from this electronic transmission authorization any written record that is required to be given or mailed that relates to the business of life insurance.

This bill would repeal that exception, thereby indefinitely authorizing written records relating to the business of life insurance to be provided by electronic transmission if the insurer complies with the specified requirements.

Existing law, until January 1, 2021, requires a licensee who is required to transmit a record by return receipt, registered mail, certified mail, signed written receipt of delivery, or other method of delivery evidencing actual receipt by the person, and who transmits that record electronically, to maintain a process or system that demonstrates proof of delivery and actual receipt of the record. Under existing law, until January 1, 2021, a licensee who transmits a notice of lapse, nonrenewal, cancellation, or termination of an insurance product electronically is also required to demonstrate that proof of delivery.

This bill would eliminate the January 1, 2021 sunset date, thereby making those proof of delivery and actual receipt requirements apply indefinitely.

Existing law authorizes the Department of Insurance to suspend a licensee from providing records by electronic transmission if there is a pattern or practices that demonstrate the licensee has failed to comply with specified requirements regarding those records. Existing law authorizes a licensee to appeal the suspension, as specified.

This bill would instead require the Insurance Commissioner, when the commissioner has reason to believe that a licensee has been or is engaged in conduct that violates those requirements, to issue a statement of charges to the licensee and to provide the

licensee with a hearing, as specified. The bill would authorize the licensee to obtain a review of the order of the commissioner by making a specified filing in court. The bill would additionally subject any licensee who violates a cease and desist order regarding these requirements to specified civil penalties or a suspension or revocation of a licensee's license, if the licensee knew or reasonably should have known it was in violation of the cease and desist order.

This bill would require the commissioner, on or before January 1, 2022, to submit a report to the Governor and to the committees of the Senate and Assembly having jurisdiction over insurance and the judiciary, regarding insurer compliance with laws governing electronic transmissions of insurance transactions.
Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1633.3 of the Civil Code, as amended by Section 2 of Chapter 617 of the Statutes of 2016, is amended to read:

1633.3. (a) Except as otherwise provided in subdivisions (b) and (c), this title applies to electronic records and electronic signatures relating to a transaction.

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1206 and 1306.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

(c) This title does not apply to any specific transaction described in Section 17511.5 of the Business and Professions Code, Section 56.11, 56.17, 798.14, 1133, or 1134 of, Section 1689.6, 1689.7, or 1689.13 of, Chapter 2.5 (commencing with Section 1695) of Title 5 of Part 2 of Division 3 of, Section 1720, 1785.15, 1789.14, 1789.16, or 1793.23 of, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of, Section 1861.24, 1862.5, 1917.712, 1917.713, 1950.6, 1983, 2924b, 2924c, 2924f, 2924i, 2924j, 2924.3, or 2937 of, Article 1.5 (commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3 of, Section 2954.5 or 2963 of, Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of, Section 3071.5 of Part 5 (commencing with Section 4000) of Division 4 of, or Part 5.3 (commencing with Section 6500) of Division 4 of this code, subdivision (b) of Section 18608 or Section 22328 of the Financial Code, Section 1358.15, 1365, 1368.01, 1368.1, 1371, or 18035.5 of the Health and Safety Code, Section 786 as it applies to individual and group disability policies, 10192.18, 10199.44, 10199.46, 10235.16, 10235.40, 11624.09, or 11624.1 of the Insurance Code, Section 779.1, 10010.1, or 16482 of the Public Utilities Code, or Section 9975 or 11738 of the Vehicle Code. An electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure. Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means.

(d) This title applies to an electronic record or electronic signature otherwise excluded from the application of this title under subdivision (b) when used for a transaction subject to a law other than those specified in subdivision (b).

(e) A transaction subject to this title is also subject to other applicable substantive law.

(f) The exclusion of a transaction from the application of this title under subdivision (b) or (c) shall be construed only to exclude the transaction from the application of this title, but shall not be construed to prohibit the transaction from being conducted by electronic means if the transaction may be conducted by electronic means under any other applicable law.

(g) Notwithstanding subdivisions (b) and (c), this title shall apply to electronic records and electronic signatures relating to transactions conducted by a person licensed, certified, or registered pursuant to the Alarm Company Act (Chapter 11.6 (commencing with Section 7590) of Division 3 of the Business and Professions Code) for purposes of activities authorized by Section 7599.54 of the Business and Professions Code.

SEC. 2. Section 1633.3 of the Civil Code, as amended by Section 3 of Chapter 617 of the Statutes of 2016, is repealed.

SEC. 3. Section 38.6 of the Insurance Code, as added by Section 7 of Chapter 617 of the Statutes of 2016, is repealed.

SEC. 4. Section 38.6 of the Insurance Code, as amended by Section 137 of Chapter 561 of the Statutes of 2017, is amended to read:

38.6. (a) (1) A written record required to be given or mailed to a person by a licensee, including an offer of renewal required by Sections 663 and 678, the notice of policy change or cancellation requested by the insured as required by Section 667.5, the notice of conditional renewal required by Section 678.1, the offer of coverage or renewal or a disclosure required by Section 10086, the offer of renewal for a workers' compensation policy, Section 662, paragraph (2) of subdivision (a) of Section 663, Section 664, 667.5, 673, 677, paragraph (2) of subdivision (a) of Section 678, subdivisions (a), (b), and (c) of Section 678.1, or a written record required to be given or mailed to a person by a licensee relating to the business of life insurance, as defined in Section 101 of this code may, if not excluded by subdivision (b) or (c) of Section 1633.3 of the Civil Code, be provided by electronic transmission pursuant to Title 2.5 (commencing with Section 1633.1) of Part 2 of Division 3 of the Civil Code, if each party has agreed to conduct the transaction by electronic means pursuant to Section 1633.5 of the Civil Code, and if the licensee complies with this section. A valid electronic signature is sufficient for any law requiring a written signature.

(2) For purposes of this section, the definitions set forth in Section 1633.2 of the Civil Code apply. The term "licensee" means an insurer, agent, broker, or any other person who is required to be licensed by the department.

(3) Notwithstanding subdivision (l) of Section 1633.2 of the Civil Code, for purposes of this section, "person" includes, but is not limited to, the policy owner, policyholder, applicant, insured, or assignee or designee of an insured.

(b) In order to transmit a record listed in subdivision (a) electronically, a licensee shall comply with all of the following:

(1) A licensee, or licensee's representative, acquires the consent of the person to opt in to receive the record by electronic transmission, and the person has not withdrawn that consent, prior to providing the record by electronic transmission. A person's consent may be acquired verbally, in writing, or electronically. If consent is acquired verbally, the licensee shall confirm consent in writing or electronically. The licensee shall retain a record of the person's consent to receive the record by electronic transmission with the policy information so that it is retrievable upon request by the department while the policy is in force and for five years thereafter.

(2) A licensee discloses, in writing or electronically, to the person all of the following:

(A) The opt in to receive the record by electronic transmission is voluntary.

(B) That the person may opt out of receiving the record by electronic transmission at any time, and the process or system for the person to opt out.

(C) A description of the record that the person will receive by electronic transmission.

(D) The process or system to report a change or correction in the person's email address.

(E) The licensee's contact information, that includes, but is not limited to, a toll-free number or the licensee's internet website address.

(3) The opt-in consent disclosure required by paragraph (2) may be set forth in the application or in a separate document that is part of the policy approved by the commissioner and shall be bolded or otherwise set forth in a conspicuous manner. The person's signature shall be set forth immediately below the opt-in consent disclosure. If the licensee seeks consent at any time prior to the completion of the application, consent and signature shall be obtained before the application is completed. If the person has not opted in at the time the application is completed, the licensee may receive the opt-in consent at any time thereafter, pursuant to the same opt-in requirements that apply at the time of the application. The licensee shall retain a copy of the signed opt-in consent disclosure with the policy information so that each is retrievable upon request by the department while the policy is in force and for five years thereafter.

(4) The email address of the person who has consented to electronic transmission shall be set forth on the consent disclosure. In addition, if the person who consented receives an annual statement, the email address of the person who has consented shall be set forth on that record.

(5) The licensee shall annually provide one free printed copy of any record described in this subdivision upon request by the person.

(6) If a provision of this code requires a licensee to transmit a record by first-class mail, regular mail, does not specify a method of delivery, or is a record that is required to be provided pursuant to Article 6.6 (commencing with Section 791), and if the licensee is not otherwise prohibited from transmitting the record electronically under subdivision (b) of Section 1633.8 of the Civil Code, then the record may be transmitted by electronic transmission if the licensee complies with all of the requirements of Sections 1633.15 and 1633.16 of the Civil Code.

(7) Notwithstanding subdivision (b) of Section 1633.8 of the Civil Code, if a provision of this code requires a licensee to transmit a record by return receipt, registered mail, certified mail, signed written receipt of delivery, or other method of delivery evidencing actual receipt by the person, and if the licensee is not otherwise prohibited from transmitting the record electronically under Section 1633.3 of the Civil Code and this section, then the licensee shall maintain a process or system that demonstrates proof of delivery and actual receipt of the record by the person consistent with this paragraph. The licensee shall document and retain information demonstrating delivery and actual receipt so that it is retrievable, upon request, by the department at least five years after the policy is no longer in force. The record provided by electronic transmission shall be treated as if actually received if the licensee delivers the record to the person in compliance with applicable statutory delivery deadlines. A licensee may demonstrate actual delivery and receipt by any of the following:

(A) The person acknowledges receipt of the electronic transmission of the record by executing an electronic signature.

(B) The record is posted on the licensee's secure internet website, and there is evidence demonstrating that the person logged onto the licensee's secure internet website and downloaded, printed, or otherwise acknowledged receipt of the record.

(C) The record is transmitted to the named insured through an application on a personal electronic device that is secured by password, biometric identifier, or other technology, and there is evidence demonstrating that the person logged into the application and viewed or otherwise acknowledged receipt of the record.

(D) If a licensee is unable to demonstrate actual delivery and receipt pursuant to this paragraph, the licensee shall resend the record by regular mail to the person in the manner originally specified by the underlying provision of this code.

(8) Notwithstanding any other law, a notice of lapse, nonrenewal, cancellation, or termination of any product subject to this section may be transmitted electronically if the licensee demonstrates proof of delivery as set forth in paragraph (7) and complies with the other provisions in this section.

(9) If the record is not delivered directly to the electronic address designated by the person but placed at an electronic address accessible to the person, a licensee shall notify the person in plain, clear, and conspicuous language at the electronic address designated by the person that describes the record, informs that person that it is available at another location, and provides instructions to the person as to how to obtain the record.

(10) (A) Upon a licensee receiving information indicating that the record sent by electronic transmission was not received by the person, the licensee shall, within five business days, comply with either clause (i) or (ii):

(i) Contact the person to confirm or update the person's email address and resend the record by electronic transmission. If the licensee elects to resend the record by electronic transmission, the licensee shall demonstrate the transmission was received by the person, pursuant to paragraph (6), (7), or (8). If the licensee is unable to confirm or update the person's email address, the licensee shall resend the record by regular mail to the licensee at the address shown on the policy, or, if the underlying statute requires delivery in a specified manner, send the record in that specified manner.

(ii) Resend the record initially provided by electronic transmission by regular mail to the insured at the address shown on the policy, or, if the underlying statute requires delivery in a specified manner, send the record in that specified manner.

(B) If the licensee sends the first electronic record within the time period required by law and the licensee complies with both paragraph (5) and subparagraph (A) of this paragraph, the record sent pursuant to clause (i) or (ii) of subparagraph (A) shall be treated as if mailed in compliance with the applicable statutory regular mail delivery deadlines.

(11) The licensee shall not charge any person who declines to opt in to receive a record through electronic transmission from receiving a record electronically. The licensee shall not provide a discount or an incentive to any person to opt in to receive electronic records.

(12) The licensee shall verify a person's email address via paper writing sent by regular mail when more than 12 months have elapsed since the licensee's last electronic communication.

(c) An insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature shall not be held liable for any deficiency in the electronic procedures agreed to by the parties under that contract if all of the following are met:

(1) The insurance agent or broker has not engaged in negligent, reckless, or intentional tortious conduct.

(2) The insurance agent or broker was not involved in the development or establishment of the electronic procedures.

(3) The insurance agent or broker did not deviate from the electronic procedures.

(d) On or before January 1, 2022, the commissioner shall submit a report to the Governor and to the committees of the Senate and Assembly having jurisdiction over insurance and the judiciary, regarding insurer compliance with laws governing electronic transmissions of insurance transactions, including renewal offers, notices, or disclosures. The commissioner shall ensure the report addresses the use of electronic transmissions by insurers conducting the business of insurance, the department's enforcement actions relating to those electronic transmissions, and the impact of those enforcement actions on insurer compliance rates.

(e) Notwithstanding paragraph (4) of subdivision (b) of Section 1633.3 of the Civil Code, a statutory requirement for a separate acknowledgment, signature, or initial that is not expressly prohibited by subdivision (c) of Section 1633.3 of the Civil Code may be transacted using an electronic signature, or by electronic transaction, subject to all applicable provisions of this section.

(f) (1) Whenever the commissioner has reason to believe that a licensee has been or is engaged in conduct in this state that violates this section, or if the commissioner believes that a licensee has been or is engaged in conduct outside this state that has an effect on an insurance risk located within this state and that violates this section, the commissioner shall issue and serve upon that licensee a statement of charges and notice of hearing to be held at a time and place fixed in the notice. The date for the hearing shall be not less than 30 days after the date of service.

(2) At the time and place fixed for the hearing, the licensee charged shall have an opportunity to answer the charges against it and present evidence on its behalf. Upon good cause shown, the commissioner shall permit any adversely affected person to appear and be heard at the hearing by counsel or in person.

(3) At any hearing conducted pursuant to this section, the commissioner may administer oaths, examine and cross-examine witnesses, and receive oral and documentary evidence. The commissioner shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, and other documents that are relevant to the hearing. A stenographic record of the hearing shall be made upon the request of any party or at the discretion of the commissioner. If no stenographic record is made and if judicial review is sought, the commissioner shall prepare a statement of the evidence for use on review. Hearings conducted under this section shall be governed by the same rules of evidence and procedure applicable to administrative proceedings conducted under the laws of this state.

(4) Statements of charges, notice, orders, and other processes of the commissioner under this section may be served by anyone duly authorized to act on behalf of the commissioner. Service of process may be completed in the manner provided by law for service of process in civil actions or by registered mail or by a mailing service offered by a third-party with tracking capability that is not more expensive than registered mail. A copy of the statement of charges, notice, order, or other process shall be provided to the person or persons whose rights under this section have been allegedly violated. A verified return setting forth the manner of service, the return postcard receipt in the case of registered mail, or signed receipt documentation shall be sufficient proof of service.

(5) If, after a hearing pursuant to paragraphs (1) through (4), the commissioner determines that the licensee charged has engaged in conduct or practices in violation of this section, the commissioner shall reduce their findings to writing and shall issue and cause to be served upon the licensee a copy of the findings and an order requiring the licensee to cease and desist from the conduct or practices constituting a violation of this section. As part of the order, the commissioner may suspend a licensee from providing records by electronic transmission if there is a pattern or practice that demonstrates the licensee has failed to comply with the requirements of this section. A licensee may appeal the suspension and resume its electronic transmission of records upon communication from the department that the changes the licensee made to its process or system to comply with the requirements of this section are satisfactory.

(6) Until expiration of the time allowed using the procedure set forth in paragraph (7) for filing a petition for review or until the petition is actually filed, whichever occurs first, the commissioner may modify or set aside any order issued under this section. After expiration of the time allowed under paragraph (7) for filing a petition for review, if no petition has been duly filed, the commissioner may, after notice and opportunity for hearing, alter, modify, or set aside, in whole or in part, any order issued under this section whenever conditions of fact or law warrant that action or if the public interest requires.

(7) A licensee subject to an order of the commissioner under this section or a person whose rights under this section were allegedly violated may obtain a review of an order of the commissioner by filing a petition in a court of competent jurisdiction, within 30 days from the date of the service of the order, pursuant to Section 1094.5 of the Code of Civil Procedure. The court shall have jurisdiction to make and enter a decree modifying, affirming, or reversing any order of the commissioner, in whole or in part.

(8) An order issued by the commissioner under this section shall become final upon either of the following:

(A) Upon the expiration of the time allowed for the filing of a petition for review, if no petition has been duly filed. However, the commissioner may modify or set aside an order to the extent provided in paragraph (6).

(B) Upon a final decision of the court, if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

(9) An order of the commissioner under this section or order of a court to enforce the order of the commissioner shall not in any way relieve or absolve a person or licensee affected by that order from liability under any law of this state.

(10) A licensee who violates a cease and desist order of the commissioner under this section may, after notice and hearing and upon order of the commissioner, be subject to one of the following penalties at the discretion of the commissioner:

(A) A civil penalty of not more than ten thousand dollars ($10,000) for each violation, except that the total civil penalty for violations of this section in a single investigation shall not exceed two hundred fifty thousand dollars ($250,000).

(B) A civil penalty of not more than two hundred fifty thousand dollars ($250,000) if the commissioner finds that violations have occurred with such frequency as to constitute a general business practice.

(C) Suspension or revocation of a licensee’s license if the licensee knew or reasonably should have known it was in violation of the cease and desist order.