# LAW 257

# REAL ESTATE TRANSACTIONS AND LITIGATION

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First Assignment

(Portion of Chapter 1)

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## PREFACE AND COURSE OVERVIEW

These materials and the course for which they have been assembled, Real Estate Transactions and Litigation (Law 257), are intended to introduce you to the major elements of and participants in modern real estate transactions. Two aspects of this statement of purpose warrant further explanation.

First, the emphasis in both the course and its materials is on transactions -- that is, the flow of interests in land between buyers and sellers, optionors and optionees, lessors and lessees and, to a lesser extent, borrowers and their real property-secured lenders. Real estate brokers, escrow agents, title insurance companies, appraisers and real estate attorneys all play important roles in these events. The cases and transactions which we will be discussing generally involve conventional and familiar interests in land such as fee simple, options, commercial leases, and executory contracts. While the course presumes at least a rudimentary familiarity with estates in land and future interests, we will spend virtually no time dealing with the characterization of estates in land. The more exotic estates and future interests are unlikely to make more than cameo appearances.

The second point bearing emphasis is that this course focuses primarily, but not exclusively, on real estate marketing transactions, as opposed to transactions in which land serves as security for payment of a debt. At the risk of over-simplification, this distinction can perhaps best be explained by noting that, in marketing transactions, the use, enjoyment or ownership of the land is the primary object and essence of the deal. On the other hand, in security transactions (typically, but not inevitably, involving mortgages or trust deeds), the interests in land are a means to some other end, typically the payment of a debt. In the real world, however, this distinction is not so easily drawn, and a transaction which may appear to be

a purely marketing deal may in fact be a disguised secured transaction. The converse may also be true. The basic concepts of real estate-secured transactions will be introduced, and techniques for distinguishing between marketing and security transactions will be discussed. A companion course offered in the Spring semester (Law 257.1) will delve more deeply into the subject of real estate-secured transactions.

This course is not limited to California law and is, at least to some extent, national in scope. However, a number of factors bias the geographic focus of the course toward West Coast jurisdictions generally and California in particular:

Despite some movement toward federalization of certain aspects of real estate law and the development and sporadic enactment of "uniform" or "model" codes in certain areas of the real estate field, real estate law still remains primarily the preserve of state and local control. The time constraints of this course simply do not permit a comprehensive examination of the total mosaic of state real property law.

Of even greater importance in the jurisdictional bias of this course, however, is the fact that the local and regional customs and practices of real estate professionals who are neither lawyers nor judges play a tremendously important role in real estate transactions. Seasoned real estate lawyers are well aware that it is often at least as important to structure a transaction to the satisfaction of the prospective title insurer as it is to worry about how a court might ultimately construe the deal. Similarly, escrow holders (often title companies acting in an escrow role) frequently influence the form and success of real estate transactions and, in many cases, draft the escrow instructions that may become a part of the contract between the parties. The importance of these non-juridical real estate professionals in real estate transactions cannot be overestimated, particularly in the Western U.S. where title insurance companies discharge many of the functions

traditionally performed by attorneys. Since the practices and institutions customary in the West--including the use of both title insurance and independent escrow companies--are gradually becoming the norm for much of the country and even the world, this course will give you a head start on a real estate practice in virtually any jurisdiction.

A final reason for the emphasis on California is that, the California Supreme Court and, to a lesser extent, the intermediate California appellate courts continue to be leaders in the refinement and development of real estate law for the nation. This leadership is based not only on the intellectual prowess of California appellate jurists, but on the fact that California simply generates more transactions and more law than many other jurisdictions combined. Anyone who has watched the relentless march of volumes of published appellate decisions across the bookshelves of a law library knows this. California is a laboratory and crucible in which extensive development activity, typically high property values, extreme population pressures, strong environmental sensibilities and a fast-paced business culture combine to create a legal environment in which hoary law school real property doctrines and "black-letter law" are rarely taken as gospel. Instead, California courts are inclined to require that legal rules and doctrines make good sense from an economic and public policy perspective. This makes for a particularly high density of appellate cases in which legal premises are challenged and new trends are explored and developed. The California Supreme Court's decision in *Citizens for Covenant Compliance v. Anderson,* found in Chapter 3, is a perfect example of this tendency to reject received legal wisdom. In short, if you have mastered California real property law, you will find yourself well prepared and sufficiently nimble to deal with similar bodies of law in virtually any U.S. jurisdiction.

# CHAPTER 1

# REAL ESTATE BROKERS AND SALES AGENTS

## A. INTRODUCTION

We cover the law of real estate brokers first and at some length for a variety of reasons. Typically, the contract between broker and prospective seller--the so-called "listing" agreement—is created before any contract or agreement between buyer and seller. Discussing the role of brokers also provides a perfect opportunity to evaluate the web of potentially conflicting interests that exists in virtually every real estate marketing transaction. Finally, because of their professional training and experience and their control over the flow of information within real estate transactions, brokers and their influential trade associations exert a great deal of influence over the form and content of both residential and commercial real estate marketing laws, forms[1] and transactions.[2]

The most difficult and interesting problems which arise in the law of real estate brokers are:

1. How are brokers and sales agents compensated and when have they earned their commissions?

2. What are the broker's powers and duties, particularly with regard to such issues as disclosure, due diligence, investigation and loyalty?

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[1] As you read the materials, notice how the standard forms have been drafted to respond to concerns expressed by the legislature and the courts but in a way that maximizes enlightened broker advamtage.

[2] A good indication of the pervasive influence of real estate brokers is the fact that they, along with title and escrow professionals, are responsible for much of the vernacular of the real estate marketplace. Thus, a typical real estate contract of purchase and sale in California, and in many other jurisdictions, is often referred to as a "deposit receipt," although this name exaggerates one small aspect of the real estate sales contract which happens to be of particular concern to brokers. Similarly, the term "close of escrow" may have subtly but significantly different meanings at law and in the daily practice of escrow companies, title insurance companies and brokers.

3. To whom are those duties owed?

4. What is the relationship among and between brokers and their "clients" (including dual agency and sub-agency problems)?

5. What is the relationship between brokers and the sales agents they are supposed to supervise?

6. How do brokers and their professional associations affect competition in real estate markets, and how can such competition be protected and encouraged?

## B. SOURCES OF RELEVANT LAW

As with most topics in the real property area, state law is controlling on most issues.[3] In California, brokers are closely regulated by a vigorous arm of State government, the California Department of Real Estate ("DRE"), which promulgates, pursuant to a delegation of legislative authority, extensive regulations controlling virtually every aspect of a broker's professional activities. *See* California Business and Professions Code §§10000, *et seq*. Familiarity with these regulations is useful to any California lawyer practicing in the real estate area. However, the regulations--many of which deal with matters such as professional licensure, examinations, discipline, continuing education and record keeping--are too detailed and jurisdiction-specific for extensive treatment in the present course.

Since this course focuses on brokers at the point of their representation of clients in real estate marketing transactions, we will emphasize cases focusing on brokers involved in sales transactions. We will also review selected statutory materials from the California Civil and

[3] Major federal law intrusions into this traditionally state law sphere of influence, such as the Real Estate Settlement Procedures Act, 12 U.S.C. Sections 2601 – 2617, will be touched on elsewhere in the course.

Business and Professions Codes illustrating the Legislature's response, often in dialogue with the courts, to public policy issues arising out of the acts or omissions of brokers.

### C. SELECTED CALIFORNIA STATUTORY AND REGULATORY MATERIALS CONCERNING BROKER LICENSING, DISCIPLINE AND RECOVERIES

The following statutory and regulatory materials represent only a fraction of the relevant law in California concerning the licensing, status and activities of real estate brokers and sales agents. The policy basis of certain of the statutes will hopefully become clearer after you have read and discussed in class the cases following these statutory materials. For the time being, peruse the statutes in order to get a feel for the emphasis and methodology of the legislative approach to the activities of real estate brokers.

**CALIFORNIA BUSINESS AND PROFESSIONS CODE:**

**§10000. Short title**

This part may be cited as the Real Estate Law.

**§10011. "Licensee"**

"Licensee," when used without modification, refers to a person, whether broker or salesman, licensed under any of the provisions of this part.

**§10012. "Broker"**

"Broker" when used without modification, refers to a person licensed as a broker under any of the provisions of this part.

**§10013. "Salesman"**

"Salesman," when used without modification, refers to a person licensed as a salesman under any of the provisions of this part.

**§10014. "Real estate licensee"**

"Real estate licensee" refers to a person, whether broker or salesman, licensed under Chapter 3 of this part.

**§10015. "Real estate broker"**

"Real estate broker" refers to a person licensed as a broker under Chapter 3 of this part.

**§10016. "Real estate salesman"**

"Real estate salesman" refers to a person licensed as a salesman under Chapter 3 of this part.

**§10027. "Listing"**

The term "listing" as used in this part includes, but is not limited to:

(a) The name or a list of the names, of the owners, landlords, exchangers, or lessors, or the location or locations, of property, or of an interest in property, offered for rent, sale, lease, or exchange.

(b) The name, or a list of the names, or the location or locations at which prospective or potential purchasers, buyers, lessees, tenants or exchangers of property may be found or contacted.

(c) An agreement by which a person who is engaged in the business of promoting the sale or lease of business opportunities or real estate agrees to render to an owner or lessee of such property any services, to promote the sale or lease of said property.

(d) An agreement by which a person who is engaged in the business of finding, locating or promoting the sale or lease of business opportunities or real estate, agrees to circularize, notify or refer real estate brokers or salesmen to said property which is offered for sale or lease.

**§10050. Department; chief officer; duties**

There is in the Business and Transportation Agency a Department of Real Estate, the chief officer of which department is named the Real Estate Commissioner.

It shall be the principal responsibility of the commissioner to enforce all laws in this part (commencing with Section 10000) and Chapter 1 (commencing with Section 11000) of Part 2 of this division in a manner which achieves the maximum protection for the purchasers of real property and those persons dealing with real estate licensees.

**§10080. Rules and regulations**

The commissioner may adopt, amend, or repeal such rules and regulations as are reasonably necessary for the enforcement of the provisions of this part and of Chapter 1 (commencing with Section 11000) of Part 2 of this division. Such rules and regulations shall be adopted, amended, or repealed in accordance with the provisions of the Administrative Procedure Act. In addition to other notices required by law, the commissioner shall notify the

Real Estate Advisory Commission of his intention to adopt rules and regulations at least 30 days prior to such adoption.

**§10130. Necessity of license; complaints for violations; prosecutor**

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

**§10131. Real estate broker**

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

**§10132. Salesman**

A real estate salesman within the meaning of this part is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6.

**§10133. Exemptions from real estate broker licensing requirements**

(a) The acts described in Section 10131 are not acts for which a real estate license is required if performed by:

(1) a regular officer of a corporation or a general partner of a partnership with respect to real property owned or leased by the corporation or partnership, respectively, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, respectively, if the acts are not performed by the officer or partner in expectation of special compensation.

(2) A person holding a duly executed power of attorney from the owner of the real property with respect to which the acts are performed.

(3) An attorney at law in rendering legal services to a client.

(4) A receiver, trustee in bankruptcy or other person acting under order of a court of competent jurisdiction.

(5) A trustee for the beneficiary of a deed of trust when selling under authority of that deed of trust.

(b) The exemptions in subdivision (a) are not applicable to a person who uses or attempts to use them for the purpose of evading the provisions of this part.

**§10176. Investigation; conduct of business; grounds for suspension or revocation**

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

(b) Making any false promises of a character likely to influence, persuade or induce.

(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.

(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

(e) Commingling with his own money or property the money or other property of others which is received and held by him.

(f) Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination.

(g) The claiming or taking by licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other different procedure.

(h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing such licensee to see, buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount of licensee's profit and obtains the written consent of the employer approving the amount of such profit.

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(j) Obtaining the signature of a prospective purchaser to an agreement which provides that such prospective purchaser shall either transact the purchasing, leasing, renting or exchanging of a business opportunity property through the broker obtaining such signature, or pay a compensation to such broker if such property is purchased, leased, rented or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer such property for sale, lease, exchange or rent.

**§10177. Grounds**

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a

subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in, the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision (as defined in Chapter 1 (commencing with Section 11000) of Part 2) offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or any trade name or insignia of membership in any real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner which would have warranted the denial of his or her application for a real estate license, or has either had a license denied or a license issued by another agency of this state, another state, or the federal government, revoked or suspended for acts which if done by a real estate licensee would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedures Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in any order granting a restricted license.

(l) Solicited or induced the sale, lease or the listing for sale or lease, of residential property on the ground, wholly or in part, of loss of value, increase in crime, or

decline of the quality of the schools, due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee occupies a special relationship shall be disclosed to the buyer.

(p) Violated Article 6 (commencing with Section 10237)

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent of more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

**§10450.6. Education and research account; recovery account; purpose; credits**

There shall be separate accounts in the Real Estate Fund for purposes of real estate education and research and for purposes of recovery which shall be known respectively as the Education and Research Account and the Recovery Account. The commissioner may, by regulation, require that up to 8 percent, or such lesser amount as he or she deems appropriate, of the amount of any license fee collected under this part be credited to the Education and Research Account. Twelve percent of the amount of any license fee collected shall be credited to the Recovery Account, provided, however, that if as of June 30 of any fiscal year the balance of funds in the Recovery Account is at least $3,000,000, all funds in excess of this amount which have been credited to the Recovery Account shall instead be credited to the Real Estate Fund. As long as the balance of the funds in the Recovery Account exceeds $3,000,000, all license fees collected, except for the percentage of license fees credited to the Education and Research Account, shall be credited to the Real Estate Fund. Funds in the Education and Research Account shall be used by the commissioner in accordance with Section 10451.5. The Recovery Account is a continuing appropriation for carrying out Chapter 6.5 (commencing with Section 10470).

**§10471. Application for payment from Recovery Account; delivery and service; contents**

(a) When an aggrieved person obtains a final judgment in a court of competent jurisdiction or an arbitration award which includes findings of fact and conclusions of law rendered in accordance with the rules established by the American Arbitration Association or another recognized arbitration body, and in accordance with Sections 1281 to 1294.2, inclusive, of the Code of Civil Procedure where applicable, and where the arbitration award has been confirmed and reduced to judgment pursuant to Section 1287.4 of the Code of Civil Procedure, against a defendant based upon the defendant's fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds arising directly out of any transaction in which the defendant, while licensed under this part, performed acts for which a real estate license was required, the aggrieved person may, upon the judgment becoming final, file an application with the Department of Real Estate for payment from the Recovery Account, within the limitations specified in Section 10474, of the amount unpaid on the judgment which represents an actual and direct loss to the claimant in the transaction.

(b) The application shall be delivered in person or by certified mail to an office of the department not later than one year after the judgment has become final.

(c) The application shall be made on a form prescribed by the department, verified by the claimant, and shall include the following:

(1) The name and address of the claimant.

(2) If the claimant is represented by an attorney, the name, business address, and telephone number of the attorney.

(3) The identification of the judgment, the amount of the claim and an explanation of its computation.

(4) A detailed narrative statement of the facts in explanation of the allegations of the complaint upon which the underlying judgment is based.

(5) A statement by the claimant, signed under penalty of perjury, that the complaint upon which the underlying judgment is based was prosecuted conscientiously and in good faith. As used in this section, "conscientiously and in good faith" means that no party potentially liable to the claimant in the underlying transaction was intentionally and without good cause omitted from the complaint, that no party named in the complaint who otherwise reasonably appeared capable of responding in damages was dismissed from the complaint intentionally and without good cause, and that the claimant employed no other procedural tactics contrary to the diligent prosecution of the complaint in order to provide access to the Recovery Account.

(6) The name and address of the judgment debtor or, if not known, the names and addresses of persons who may know the judgment debtor's present whereabouts.

(7) The following representations and information from the claimant:

(A) That he or she is not a spouse of the judgment debtor nor a personal representative of the spouse.

(B) That he or she has complied with all of the requirements of this chapter.

(C) That the judgment underlying the claim meets the requirements of subdivision (a).

(D) A description of searches and inquiries conducted by or on behalf of the claimant with respect to the judgment debtor's assets liable to be sold or applied to satisfaction of the judgment, an itemized valuation of the assets discovered, and the results of actions by the claimant to have the assets applied to satisfaction of the judgment.

(E) That he or she has diligently pursued collection efforts against other judgment debtors and all other person liable to the claimant in the transaction that is the basis for the underlying judgment.

(F) That the underlying judgment and debt have not been discharged in bankruptcy, or, in the case of a bankruptcy proceeding that is open at the time of the filing of the application, that the judgment and debt have been declared to be nondischargeable.

(G) That the application was mailed or delivered to the department no later than one year after the underlying judgment became final.

(d) If the claimant is basing his or her application upon a judgment against a salesperson, and the claimant has not obtained a judgment that salesperson's employing broker, if any, or has not diligently pursued the assets of that broker, the application shall be denied for failure to diligently pursue the assets of all other persons liable to the claimant in the transaction unless the claimant can demonstrate, by clear and convincing evidence, either that the salesperson was not employed by a broker at the time of the transaction, or that the salesperson's employing broker would not have been liable to the claimant because the salesperson was acting outside the scope of his or her employment by the broker in the transaction.

(e) The application form shall include detailed instructions with respect to documentary evidence, pleadings, court rulings, the products of discovery in the underlying litigation, and a notice to the applicant of his or her obligation to protect the underlying judgment from discharge in bankruptcy, to be appended to the application.

(f) An application for payment from the Recovery Account that is based on a criminal restitution order shall comply with all of the requirements of this chapter. For the purpose of an application based on a criminal restitution order, the following terms have the following meanings:

(1) "Judgment" means the criminal restitution order.

(2) "Complaint" means the facts of the underlying transaction upon which the criminal restitution order is based.

(3) "Judgment debtor" means any defendant who is the subject of the criminal restitution order.

**NOTES AND QUERIES**

1. The bifurcation of real estate licensees into brokers and sales agents is a well-established arrangement that in some respects parallels the classical relationship between partners and associates in law firms. A broker's license requires significantly more training and practical experience than does a sales agent's license. In order to work well, the system requires real and regular involvement by the broker in transactions being handled primarily by an agent. Unfortunately, this supervision is sometimes more theoretical than real. The adequacy of such supervision should be a major point of inquiry in any lawsuit concerning alleged negligence or other misconduct by the agent.

2. Real estate brokers, like many other professionals, operate enterprises that have a relatively low level of capitalization. A broker's only essential assets are her knowledge, her license and her professional relationships (*e.g.*, such as in multiple listing services and local Boards of Realtors®). How do these circumstances relate to and explain the creation of the Real Estate Recovery Account outlined in the preceding statutory materials?

## D. FUNCTIONS PERFORMED BY REAL ESTATE BROKERS

We usually think of real estate brokers and the sales agents who work under their supervision as playing a classical broker's role...*i.e.*, putting seller and buyer together and serving as intermediaries during negotiations. However, the services performed by real estate brokers in most jurisdictions are often considerably more extensive, and may involve such functions as appraiser; broker for business opportunities; and mortgage broker (*i.e.*, one who

solicits individuals with money to loan and arranges for the lending of their funds against the security of a mortgage or deed of trust). California Business and Professions Code Section 10131, *supra*, provides a fairly complete survey of the services that brokers can lawfully offer to perform.

### E. THE CONTRACT BETWEEN BROKER AND CLIENT ... THE "LISTING" OR "RIGHT TO SELL"

The relationship between a broker and at least one of the parties to a real estate sales transaction is usually embodied in a written agreement...often on a preprinted form developed by a Realtor® Association.[4] Note that the listing agreement is a contract between the seller and the broker for the marketing of the property for sale.[5] It is **not** a contract for the sale of the property. This is an important distinction that will be developed further in class discussions.

The fact that the broker's contract or "listing" is normally in writing is due in large part to the fact that most modern statutes of frauds require that the contract be in writing, and penalize a failure to prepare a written contract by the broker's forfeiture of compensation. For more on this, see Section F, below. However, there are other good reasons why brokers should and typically do obtain written listings. Brokers' legal problems frequently fall into recurring and stereotypical patterns which have been the subject of over a century of statutory and case law development. One example is the issue of whether the broker is entitled to compensation if the

[4] The terms "real estate broker" and "Realtor" are not synonymous. "Broker" is a generic term denoting the holder of a broker's license issued by the state. A "Realtor," on the other hand, is a member of certain voluntary professional or trade associations – The National Association of Realtors ("NAR") and various state associations of Realtors, including the California Association of Realtors ("CAR"). "Realtor" is a registered trademark which may be used only by members of such associations. Not all brokers are Realtors. In fact, in light of historical discrimination within the "Realtor" groups (i.e., discrimination against both the professionals and potential clients), minority (largely African-American) brokers and agents in certain areas have attempted to organize a competing group using the name "Realists."

[5] Brokers and their clients are not limited to entering into only listing agreements. A broker may also enter into contract with a buyer to locate property that the buyer may wish to purchase. See *Phillipe v. Shappell, infra*, for a discussion of the need for a written contract where the broker is locating property for a buyer.

seller takes his property off the market part way through the listing period and after the broker has put effort and expense into exposing the property to the market. Another typical problem concerns the broker's rights if a purchaser located by the broker buys the property, but not until after the listing has expired. A third issue of great interest in the 1980's and early 1990's was the allocation of the burden of discovering and disclosing defects in the property being listed and sold.

Standardized listing documents prepared by Realtor and Realist groups and by real estate attorneys are the product of an almost continuous dialogue between the courts, the several legislatures, the brokers community, and the legal profession about appropriate ways to address these recurring problems. Many of the topics and cases discussed below are reflected in the following typical listing form.

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CALIFORNIA ASSOCIATION OF REALTORS®

# EXCLUSIVE AGENCY LISTING AGREEMENT
## (And Right to Sell)
**(C.A.R. Form EA, Revised 10/02)**

1. **EXCLUSIVE AGENCY RIGHT TO SELL:** _____ ("Seller") hereby employs and grants _____ ("Broker") beginning (date) _____ and ending at 11:59 P.M. on (date) _____ ("Listing Period") the exclusive and irrevocable agency right to sell or exchange the real property in the City of _____, County of _____, California, described as: test, _____ ("Property").

2. **ITEMS EXCLUDED AND INCLUDED:** Unless otherwise specified in a real estate purchase agreement, all fixtures and fittings that are attached to the Property are included, and personal property items are excluded, from the purchase price.
**ADDITIONAL ITEMS EXCLUDED:** _____.
**ADDITIONAL ITEMS INCLUDED:** _____.
Seller intends that the above items be excluded or included in offering the Property for sale, but understands that: **(i)** the purchase agreement supersedes any intention expressed above and will ultimately determine which items are excluded and included in the sale; and **(ii)** Broker is not responsible for and does not guarantee that the above exclusions and/or inclusions will be in the purchase agreement.

3. **LISTING PRICE AND TERMS:**
   A. The listing price shall be: _____ Dollars ($ _____).
   B. Additional Terms: _____.

4. **COMPENSATION TO BROKER:**
**Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Seller and Broker (real estate commissions include all compensation and fees to Broker).**
   A. Seller agrees to pay to Broker as compensation for services irrespective of agency relationship(s), either ☐ _____ percent of the listing price (or if a purchase agreement is entered into, of the purchase price), or ☐ $ _____, AND _____, as follows:
      **(1)** If Broker or any other broker or agent procures a buyer(s) who offers to purchase the Property on the above price and terms, or on any price and terms acceptable to Seller during the Listing Period, or any extension.
      **(2)** If Seller, within _____ calendar days after the end of the Listing Period or any extension, enters into a contract to sell, convey, lease or otherwise transfer the Property to anyone ("Prospective Buyer") or that person's related entity: **(i)** who physically entered and was shown the Property during the Listing Period or any extension by Broker or a cooperating broker; or **(ii)** for whom Broker or any cooperating broker submitted to Seller a signed, written offer to acquire, lease, exchange or obtain an option on the Property. Seller, however, shall have no obligation to Broker under this paragraph 4A(2) unless, not later than **3 calendar days** after the end of the Listing Period or any extension, Broker has given Seller a written notice of the names of such Prospective Buyers.
      **(3)** If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension, except as specified in paragraph 4G below.
   B. If completion of the sale is prevented by a party to the transaction other than Seller, then compensation due under paragraph 4A shall be payable only if and when Seller collects damages by suit, arbitration, settlement or otherwise, and then in an amount equal to the lesser of one-half of the damages recovered or the above compensation, after first deducting title and escrow expenses and the expenses of collection, if any.
   C. In addition, Seller agrees to pay Broker: _____.
   D. **(1)** Broker is authorized to cooperate with and compensate brokers participating through the multiple listing service(s) ("MLS"): **(i)** in any manner, **OR (ii)** (if checked) by offering MLS brokers: either ☐ _____ percent of the purchase price, or ☐ $ _____.
      **(2)** Broker is authorized to cooperate with and compensate brokers operating outside the MLS in any manner.
   E. Seller hereby irrevocably assigns to Broker the above compensation from Seller's funds and proceeds in escrow. Broker may submit this agreement, as instructions to compensate Broker pursuant to paragraph 4A, to any escrow regarding the Property involving Seller and a buyer, Prospective Buyer or other transferee.
   F. **(1)** Seller represents that Seller has not previously entered into a listing agreement with another broker regarding the Property, unless specified as follows: _____.
      **(2)** Seller warrants that Seller has no obligation to pay compensation to any other broker regarding the Property unless the Property is transferred to any of the following individuals or entities: _____.
      **(3)** If the Property is sold to anyone listed above during the time Seller is obligated to compensate another broker: **(i)** Broker is not entitled to compensation under this agreement; and **(ii)** Broker is not obligated to represent Seller in such transaction.
   G. This is an exclusive agency listing. Seller reserves the right to sell the Property directly to a purchaser without any obligation to pay compensation to Broker, unless otherwise specified in paragraph 4C above or elsewhere in writing.




Seller acknowledges receipt of copy of this page.
Seller's Initials ( _____ ) ( _____ )

Reviewed by _____ Date _____

EQUAL HOUSING OPPORTUNITY

5. **OWNERSHIP, TITLE AND AUTHORITY:** Seller warrants that: **(i)** Seller is the owner of the Property; **(ii)** no other persons or entities have title to the Property; and **(iii)** Seller has the authority to both execute this agreement and sell the Property. Exceptions to ownership, title and authority are as follows: _____.
6. **MULTIPLE LISTING SERVICE:** Information about this listing will (or ☐ will not) be provided to the MLS of Broker's selection. All terms of the transaction, including financing, if applicable, will be provided to the selected MLS for publication, dissemination and use by persons and entities on terms approved by the MLS. Seller authorizes Broker to comply with all applicable MLS rules. MLS rules allow MLS data to be made available by the MLS to additional Internet sites unless Broker gives the MLS instructions to the contrary.
7. **SELLER REPRESENTATIONS:** Seller represents that, unless otherwise specified in writing, Seller is unaware of: **(i)** any Notice of Default recorded against the Property; **(ii)** any delinquent amounts due under any loan secured by, or other obligation affecting, the Property; **(iii)** any bankruptcy, insolvency or similar proceeding affecting the Property; **(iv)** any litigation, arbitration, administrative action, government investigation or other pending or threatened action that affects or may affect the Property or Seller's ability to transfer it; and **(v)** any current, pending or proposed special assessments affecting the Property. Seller shall promptly notify Broker in writing if Seller becomes aware of any of these items during the Listing Period or any extension thereof.
8. **BROKER'S AND SELLER'S DUTIES:** Broker agrees to exercise reasonable effort and due diligence to achieve the purposes of this agreement. Unless Seller gives Broker written instructions to the contrary, Broker is authorized to order reports and disclosures as appropriate or necessary and advertise and market the Property by any method and in any medium selected by Broker, including MLS and the Internet, and to the extent permitted by these media, control the dissemination of the information submitted to any medium. Seller agrees to consider offers presented by Broker, and to act in good faith to accomplish the sale of the Property by, among other things, making the Property available for showing at reasonable times and referring to Broker all inquiries of any party interested in the Property. Seller is responsible for determining at what price to list and sell the Property. **Seller further agrees to indemnify, defend and hold Broker harmless from all claims, disputes, litigation, judgments and attorney fees arising from any incorrect information supplied by Seller, or from any material facts that Seller knows but fails to disclose.**
9. **DEPOSIT:** Broker is authorized to accept and hold on Seller's behalf any deposits to be applied toward the purchase price.
10. **AGENCY RELATIONSHIPS:**
    A. **Disclosure:** If the Property includes residential property with one-to-four dwelling units, Seller shall receive a "Disclosure Regarding Agency Relationships" form prior to entering into this agreement.
    B. **Seller Representation:** Broker shall represent Seller in any resulting transaction, except as specified in paragraph 4F.
    C. **Possible Dual Agency With Buyer:** Depending upon the circumstances, it may be necessary or appropriate for Broker to act as an agent for both Seller and buyer, exchange party, or one or more additional parties ("Buyer"). Broker shall, as soon as practicable, disclose to Seller any election to act as a dual agent representing both Seller and Buyer. If a Buyer is procured directly by Broker or an associate licensee in Broker's firm, Seller hereby consents to Broker acting as a dual agent for Seller and such Buyer. In the event of an exchange, Seller hereby consents to Broker collecting compensation from additional parties for services rendered, provided there is disclosure to all parties of such agency and compensation. Seller understands and agrees that: **(i)** Broker, without the prior written consent of Seller, will not disclose to Buyer that Seller is willing to sell the Property at a price less than the listing price; **(ii)** Broker, without the prior written consent of Buyer, will not disclose to Seller that Buyer is willing to pay a price greater than the offered price; and **(iii)** except for (i) and (ii) above, a dual agent is obligated to disclose known facts materially affecting the value or desirability of the Property to both parties.
    D. **Other Sellers:** Seller understands that Broker may have or obtain listings on other properties, and that potential buyers may consider, make offers on, or purchase through Broker, property the same as or similar to Seller's Property. Seller consents to Broker's representation of sellers and buyers of other properties before, during and after the end of this agreement.
    E. **Confirmation:** If the Property includes residential property with one-to-four dwelling units, Broker shall confirm the agency relationship described above, or as modified, in writing, prior to or concurrent with Seller's execution of a purchase agreement.
11. **SECURITY AND INSURANCE:** Broker is not responsible for loss of or damage to personal or real property, or person, whether attributable to use of a keysafe/lockbox, a showing of the Property, or otherwise. Third parties, including but not limited to, appraisers, inspectors, brokers and prospective buyers, may have access to, and take videos and photographs of, the interior of the Property. Seller agrees: **(i)** to take reasonable precautions to safeguard and protect valuables that might be accessible during showings of the Property; and **(ii)** to obtain insurance to protect against these risks. Broker does not maintain insurance to protect Seller.
12. **KEYSAFE/LOCKBOX:** A keysafe/lockbox is designed to hold a key to the Property to permit access to the Property by Broker, cooperating brokers, MLS participants, their authorized licensees and representatives, authorized inspectors and accompanied prospective buyers. Broker, cooperating brokers, MLS and Associations/Boards of REALTORS® are **not** insured against injury, theft, loss, vandalism or damage attributed to the use of a keysafe/lockbox. Seller does (or if checked ☐ does not) authorize Broker to install a keysafe/lockbox. If Seller does not occupy the Property, Seller shall be responsible for obtaining occupant(s)' written permission for use of a keysafe/lockbox.
13. **SIGN:** Seller does (or if checked ☐ does not) authorize Broker to install a FOR SALE/SOLD sign on the Property.
14. **EQUAL HOUSING OPPORTUNITY:** The Property is offered in compliance with federal, state and local anti-discrimination laws.
15. **ATTORNEY FEES:** In any action, proceeding or arbitration between Seller and Broker regarding the obligation to pay compensation under this agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs, except as provided in paragraph 19A.
16. **ADDITIONAL TERMS:** _____
    _____
    _____
17. **MANAGEMENT APPROVAL:** If an associate licensee in Broker's office (salesperson or broker-associate) enters into this listing agreement on Broker's behalf, and Broker or Manager does not approve of its terms, Broker or Manager has the right to cancel this agreement, in writing, within 5 days after its execution.
18. **SUCCESSORS AND ASSIGNS:** This agreement shall be binding upon Seller and Seller's successors and assigns.

Seller acknowledges receipt of copy of this page.
Seller's Initials ( _____ ) ( _____ )

Reviewed by _____ Date _____





EQUAL HOUSING OPPORTUNITY

Property Address: test, , Date:

**19. DISPUTE RESOLUTION:**

A. **MEDIATION:** Seller and Broker agree to mediate any dispute or claim arising between them out of this agreement, or any resulting transaction, before resorting to arbitration or court action, subject to paragraph 19B(2) below. Paragraph 19B(2) below applies whether or not the arbitration provision is initialed. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.

B. **ARBITRATION OF DISPUTES: (1) Seller and Broker agree that any dispute or claim in Law or equity arising between them regarding the obligation to pay compensation under this agreement, which is not settled through mediation, shall be decided by neutral, binding arbitration, including and subject to paragraph 19B(2) below. The arbitrator shall be a retired judge or justice, or an attorney with at least five years of residential real estate law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered in any court having jurisdiction. Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act.**

**(2) EXCLUSIONS FROM MEDIATION AND ARBITRATION:** The following matters are excluded from mediation and arbitration hereunder: **(i)** a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; **(ii)** an unlawful detainer action; **(iii)** the filing or enforcement of a mechanic's lien; **and (iv)** any matter which is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the mediation and arbitration provisions.

**"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."**

**"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."** Seller's Initials _____ / _____ Broker's Initials _____ / _____

**20. ENTIRE CONTRACT:** All prior discussions, negotiations and agreements between the parties concerning the subject matter of this agreement are superseded by this agreement, which constitutes the entire contract and is a complete and exclusive expression of their agreement, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. This agreement and any supplement, addendum or modification, including any photocopy or facsimile, may be executed in counterparts.

**By signing below, Seller acknowledges that Seller has read, understands, accepts and has received a copy of this agreement.**

Seller _____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

Seller _____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

Real Estate Broker (Firm) _____

By (Agent) _____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

## F. BROKERS AND THE STATUTE OF FRAUDS

Whether or not the attitude is warranted, brokers are often the object of suspicion and skepticism by both judges and juries. While most members of the profession are honest and hard-working, horror stories are not hard to come by. Brokers and sales agents handle transactions involving large sums of money (in the residential context, typically the largest single investment the consumer will ever make), and their role as go-between and information conduit for credulous consumers creates plenty of room for chicanery and self-dealing. This is all more true because many real estate licensees are themselves active players in real estate markets. Close regulatory control by the DRE and a usually admirable job of self-policing and education by Realtor® groups keep the perennial problem of broker and sales agent misconduct to a manageable level.

Against this background, courts are disinclined to tolerate even apparently innocent conduct that creates the potential for abuse by brokers. This is nowhere more important than in the application of the statute of frauds, a venerable rule of law treated, in many other contexts, as subject to a broad range of exception when fairness and justice require. For brokers, however, the statute of frauds is a vigorous and occasionally draconian rule, as the following decision of the California Supreme Court illustrates.

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[L.A. No. 32034 Oct. 29, 1987.]
DAVID E. PHILLIPPE, Plaintiff and Appellant

vs.

SHAPELL INDUSTRIES, INC., Defendant and Appellant
*Phillippe v. Shapell*

(1987) 43 Cal.3d 1247 [241 Cal.Rptr. 22; 743 P.2d 1279]

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## OPINION

EAGLESON, J. -- A jury found in favor of plaintiff, a licensed real estate broker, in his action to recover a broker's commission from defendant, a real property buyer. Defendant appeals. The primary issue before us is whether a licensed real estate broker may assert equitable estoppel against a statute of frauds defense in an action by the broker to recover a real estate commission.

We conclude that a licensed real estate broker cannot invoke equitable estoppel to avoid the statute of frauds unless the broker shows actual fraud. To decide otherwise would be contrary to nearly unanimous precedent spanning several decades and to the purpose of the statute of frauds. The trial court's judgment in favor of plaintiff is reversed with directions to enter judgment in favor of defendant.

## FACTS

Viewed on appeal in a light most favorable to plaintiff David E. Phillippe (hereafter Phillippe) the evidence establishes the following: Phillippe is a real estate broker licensed for 20 years by the State of California. Defendant Shapell Industries, Inc. (hereafter Shapell) is a corporation engaged in the construction of residential housing tracts and periodically purchases land for such construction. Shapell is also a licensed California real estate broker.

Phillippe was first contacted by Shapell in early 1972 in connection with its efforts to acquire a 78-acre parcel of land in the San Diego area. Phillippe was the listing agent for the landowner. Shapell purchased the property in December 1972 and paid Phillippe $153,100 for his services as a broker.

In January 1973, Prince, then Shapell's director of land acquisition, contacted Phillippe to determine if he would be willing to work with Shapell on additional land acquisitions. They orally agreed that Phillippe would assist Shapell in finding suitable land in the Palos Verdes Peninsula area in Southern California. Phillippe explained to Prince that Phillippe then had no listings in that area and that, if he were to assist Shapell, his commission would have to be paid by Shapell as the buyer. Prince, on behalf of Shapell, orally promised Phillippe that Shapell would pay him a broker's commission for any land submitted by Phillippe and purchased by

Shapell and that this commission would be stated in any written offer made by Shapell to a seller.

Phillippe wrote to Prince on April 5, 1973, about a parcel of land owned by the Filiorum Corporation. Phillippe stated that he was "waiting for a price quote on the property" and suggested that Prince take a look at it. He also stated in this letter: "We present the property to Shapell with the understanding that Buyer will pay our firm a commission, which, when added to the net price of the land, will equal 6% of the total consideration."

By letter from Prince dated May 4, 1973, Shapell submitted to Phillippe an offer to purchase the Filiorum property and stated that "Buyer agrees to pay the Management Trend Company [Phillippe's firm] a commission [which] when added to the net price of the land will equal 6% of the total consideration. This commission should be paid at the close of escrow." The sale of the Filiorum property was not consummated due to geological problems. No commission was paid to Phillippe.

On August 9, 1973, Phillippe again wrote to Prince, this time informing Shapell of the locations and owners of 4 properties on the Palos Verdes Peninsula including a 94-acre parcel owned by Great Lakes Properties, Inc. (hereafter the Great Lakes property). Phillippe also stated in this letter that "[i]n the event properties are purchased from any of the above companies, these properties are presented with the understanding that Buyer agrees to pay Management Trend Company, or assignee, a commission which when added to the net purchase price of the land will equal 6% of the total consideration to be paid at close of escrow." Shapell did not respond in writing to Phillippe's letter. Shapell did not purchase the Great Lakes property at that time because the zoning of the property was too restrictive for Shapell's construction purposes.

Throughout late 1973 and early 1974, Phillippe continued to try to bring about a sale of the Great Lakes property to Shapell. He discussed with the owner of the Great Lakes property. Phillippe suggested a price formula and noted Shapell's financial ability to purchase the property. Phillippe also wrote several letters to Shapell the last of which was dated April 30, 1974, and was addressed to Joseph Aaron, a Shapell vice president. In this letter, Phillippe reviewed prior negotiations for the Great Lakes property and in connection with commissions stated: The commission arrangement on these properties between our firm and Shapell is spelled out in the August 9, 1973, letter [to Prince]."

In February 1974, the Great Lakes property was rezoned from one dwelling unit per two acres to two dwelling units per acre. Nothing more happened regarding the Great Lakes property until late 1975 when Aaron telephoned the property owner and learned that 63 acres were still available for sale. Direct negotiations between Shapell and the owner followed, and in March 1976 Shapell signed a purchase and sale agreement for 63 acres. The sale closed on August 27, 1976. The sale price was $2,718,750. Shapell's written purchase offer did not provide for any commission to Phillippe.

When Phillippe learned that Shapell had agreed to buy the Great Lakes property, he wrote to Aaron on June 9, 1976, and requested a commission on the purchase. Phillippe reminded Aaron that Phillippe had agreed to work for Shapell "on the condition and with the understanding that our firm was working for and represented Shapell, the buyer, as brokers and

would be paid a brokerage commission from buyer of 6% of the total consideration paid for the acquired property." Phillippe also reviewed his efforts regarding the Great Lakes property.

On June 16, 1976, Aaron responded by letter informing Phillippe that Shapell would not pay him a commission. Aaron claimed that there had been no mutual agreement of representation and that Shapell had been negotiating for the Great Lakes property "prior to and independent of any representations" by Phillippe.

In April 1977, Phillippe filed suit against Shapell to recover a 6 percent broker's commission for the sale of the Great Lakes property and other alleged damages. The case was tried in February 1982 and went to the jury on three theories of recovery. First, Phillippe sought recovery of a 6 percent broker's commission on the basis of either a written agreement of employment, a memorandum of employment sufficient to satisfy the statute of frauds, or an equitable estoppel to preclude Shapell from asserting the statute of frauds as a defense. Second, Phillippe sought a 6 percent finder's fee based on an alleged agreement with Shapell. Third, he sought a 6 percent commission based on an alleged agreement between himself and Shapell as brokers to share a commission.

The jury found by special verdict that Phillippe was the procuring cause of the purchase of the Great Lakes property by Shapell and awarded Phillippe $125,000 on his first theory of recovery but rejected his other two theories of recovery. The trial court denied Shapell's motion for a new trial and entered judgment in favor of Phillippe. [1]

Shapell appeals on the grounds, *inter alia*, that Phillippe's claim is barred by Civil Code section 1624, subdivision (d), the subdivision of California's statute of frauds dealing with real estate brokerage commissions, and that Shapell is not estopped from asserting the statute of frauds as a defense. Phillippe cross-appeals on the ground that the jury failed to award him all the damages to which he is entitled.

*DISCUSSION*

*The Agreement Between Phillippe and Shapell Is Subject to the Statute of Frauds.*

Civil Code section 1624, subdivision (d) provides that an agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate is invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or by his agent.[2] Phillippe contends Civil Code section 1624(d) does not apply to the agreement between him and Shapell. We disagree. [3]

Phillippe argues that the statute is inapplicable because he was not acting as a broker for the Great Lakes property purchased by Shapell, but only as a "professional consultant in the field of subdivision land acquisition." A licensed broker may be able under appropriate circumstances

[1] [Footnote omitted.]

[2] [Footnote omitted.]

[3] [Footnote omitted.]

to recover under an oral agreement or in quantum meruit for certain services other than the purchase, sale, or leasing of real property. ". . ." Phillippe fails to cite, and we are unable to find in the record, any evidence of professional services rendered to Shapell other than those a broker would reasonably be expected to perform in trying to consummate a sale, for example, furnishing Shapell with descriptions of the property. Phillippe's pretrial pleadings contradict his claim that he was a professional consultant. In his first amended complaint, he alleged that, after he located and presented the Great Lakes property to Shapell, it "took over all activities leading to the eventual purchase of the property by Shapell," and that, when a broker was employed by Shapell, the broker "served only as a flunky and assistant to Shapell's employees." Phillippe's services were merely incidental to his efforts to bring about a sale of the property to Shapell. Any agreement to perform those Services is thus subject to section 1624(d). ". . ."

Phillippe's own evidence makes clear that he was acting as a broker. In his April 5, 1973, letter to Prince, Phillippe stated that he was "waiting for a price quote on the property." When Phillippe wrote to Aaron on June 9, 1976, requesting a commission, Phillippe described his relationship with Shapell and the nature of his services as follows: "Early in 1973 our firm was asked by Ron Prince of Shapell to do an extensive survey of properties available for sale on the Palos Verdes Peninsula. We agreed to do so on the condition and with the understanding that our firm was working for and represented Shapell the buyer, as brokers and would be paid a brokerage commission from buyer of 6% of the total consideration paid for the acquired property." (Italics added.) Phillippe viewed himself as a broker. The nature of his claimed compensation was that of a broker's fee -- it was contingent on a sale, and it was in the customary amount charged by brokers. We agree with the observation that, "if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] [conc. opn. of Mosk, J.].) It is clear that Phillippe was acting as a broker.

We view Phillippe's characterization of himself as other than a broker as semantic sleight-of-hand. Phillippe tried this case on the primary theory that he is entitled to a broker's commission. The jury found in Phillippe's favor only on his claim for a broker's commission. He now says he was never acting as a broker. Even if that were so, the general rule is that a party may not for the first time on appeal change his theory of recovery. ". . ."

* * *

*The Agreement Between Shapell and Phillippe Does Not Meet the Requirements of Section 1624.*

A broker's real estate commission agreement is invalid under section 1624(d) unless the agreement "or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by the party's agent." The writing must unequivocally show on its face the fact of employment of the broker seeking to recover a real estate commission. (*Franklin v. Hansen* (1963) 59 Cal.2d 570, 573 [30 Cal.Rptr. 530, 381 P.2d 386]; *Pac. etc. Dev. Corp. v. Western Pac. R. R. Co., supra*, 47 Cal.2d 62, 68.) To satisfy this requirement Phillippe relies on the considerable correspondence between Shapell and himself. "It is for the court to determine whether letters which have passed between parties constitute an agreement between them." (*Wristen v. Bowles* (1889) 82 Cal. 84, 87 [22 P. 1136]; *Niles v. Hancock* (1903) 140 Cal. 157,

163 [73 P. 8401.] We have carefully reviewed the record. We find no written agreement or memorandum sufficient to comply with section 1624(d).[4]

The only writings that relate to a commission on the Great Lakes property are from Phillippe to Shapell. There is no evidence of a writing signed by Shapell showing the fact of Phillippe's employment to act as a broker for Shapell as to the Great Lakes property. There is only one letter in the exchange of correspondence referring to Phillippe's employment that is signed by Shapell. That is the letter of May 4, 1973, from Prince, Shapell's director of land acquisition, to Phillippe in which Shapell offered to buy the Filiorum property. Prince stated: "Buyer [Shapell] agrees to pay the Management Trend Company [Phillippe's firm] a commission [which] when added to the net price of the land will equal 6% of the total consideration. This commission should be paid at the close of escrow." As noted earlier, this sale was never consummated due to geology problems.

Where a broker's only agreement with his principal relates solely to specifically described property, the principal is not liable to the broker for a commission on the purchase of different property unless the broker's written employment agreement covers the other property. (*Frederick v. Curtright* (1955) 137 Cal.App.2d 610, 614 [290 P.2d 875].) The only writing signed by Shapell referred to the Filiorum property, not to the Great Lakes property, and is not sufficient under section 1624(d) to cover the Great Lakes property.

A writing signed by Shapell is not all that is lacking. The alleged oral commission agreement entered into in January 1973 was devoid of specifics. For example, there was no agreement as to the price range of properties that Phillippe would present to Shapell. There was no agreement as to geographic location other than the possible limitation to the Palos Verdes Peninsula, an area so large and loosely defined as to be almost meaningless. Nor was there any time specified within which Phillippe was to present the properties. We need not decide whether the absence of one or more such specifics would be fatal to the alleged agreement. The total lack of meaningful terms and conditions is the problem. Under the oral agreement, Shapell could have been charged with a commission for any property presented at any time by Phillippe. Such open-ended liability is unacceptable. We hold there was no writing sufficient under the statute of frauds.

*The Doctrine of Equitable Estoppel Does Not Prohibit Shapell From Asserting the Statute of Frauds as a Defense.*

Phillippe argues that Shapell should be estopped from asserting the statute of frauds as a defense even if the agreement between them was oral and thus invalid under the statute. Phillippe contends estoppel is proper because he changed his position by performing services in reliance on Shapell's oral promise to pay a commission on the Great Lakes property. Phillippe correctly cites *Monarco v. Lo Greco* (1950) 35 Cal-2d 621 [220 P.2d 737] for the proposition that estoppel is proper to avoid unconscionable injury or unjust enrichment that would result from refusal to enforce an oral promise. The principle set forth in Monarco does not, however, support the application of equitable estoppel in the present case.

[4] [Footnote omitted.]

The Courts of Appeal have consistently held, with two narrow exceptions not present here, that a licensed broker may not assert estoppel against a statute of frauds defense in an action to recover a commission under an oral employment agreement. ". . ."[5] This court has also repeatedly denied the availability of estoppel and other equitable remedies to licensed brokers in such actions. In *Tenzer v. Superscope, Inc. supra*, 39 Cal.3d 18, which did not involve a licensed broker, we noted that the rules withholding traditional equitable remedies, including the doctrine of estoppel, from licensed real estate brokers have been vigorously criticized, but we reserved for later decision the question whether licensed brokers may invoke equitable remedies to avoid the sometimes harsh results of the statute of frauds. (*Id.* at p. 28, fn. 6.) We now answer that question. [6]

We held in Tenzer that an *unlicensed real estate finder* was entitled to invoke the doctrine of equitable estoppel against a statute of frauds defense in his action to recover a commission under an oral finder's fee agreement. (*Id*. at p. 28.) Because real estate brokers must be licensed to conduct business (Bus. & Prof. Code, § 10130), almost all actions to recover commissions will be by licensed brokers, not by unlicensed finders. Thus, *Tenzer* stated a very narrow exception to section 1624(d) that will not significantly thwart the purpose of that section. To extend the Tenzer exception to licensed broken would significantly undermine section 1624(d).

In allowing equitable estoppel in Tenzer, we carefully distinguished between unlicensed finders and *licensed* brokers. The rationale for the rigorous application of the statute of frauds to bar claims by licensed real estate brokers is related to the statutory licensing requirements. `Real estate brokers are licensed as such only after they have demonstrated a knowledge of the laws relating to real estate transactions (Bus. & Prof Code, §§ 10150, 10153), and it would seem that they would thus require less protection against pitfalls encountered in transactions regulated by those laws. In Pacific Southwest Dev. *Corp. v. Western Pac. R.R. Co.* [1956] 47 Cal.2d 62 (301 P.2d 825], the court stated at page 70: "Plaintiff is a licensed real estate broker and, as such, is presumed to know that contracted for real estate commissions are invalid and unenforceable unless put in writing and subscribed by the person to be charged. [Citations.] Nevertheless, plaintiff failed to secure proper written authorization to protect itself in the transaction. Rather it assumed the risk of relying upon claimed oral promises of defendant, and it has no cause for complaint if its efforts go unrewarded." ' " (39 Cal.3d at pp. 27-28, quoting *Franklin v. Hansen* (1963) 59 Cal.2d 570, 575 [30 Cal.Rptr. 530, 381 P-2d 3861.)

The courts have long had little sympathy for the broker who fails to adhere to the statute of frauds. In *Marks v. Walter G. McCarty Corp., supra*, 33 Cal.2d 814, the plaintiff broker had dealt for several months with the owner of a hotel without obtaining a signed employment

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[5] The two circumstances where the Courts of Appeal have applied equitable estoppel are: (1) where the real estate broker cancelled an otherwise valid written contract with the sellers of the property in reliance on the buyers oral promise that he would pay the brokers commission (*Le Blond v. Wolfe* (1948) 83 Cal.App.2d 282, 287 [188 P.2d 2781]), and (2) where the broker's principal was represented to the broker that his authorization was in writing when in fact it was not (*Owens v. Foundation for Ocean Research* (1980) 107 Cal.App.3d 179, 183 [165 Cal.Rptr. 571] [disapproved on other grounds in *Tenzer v. Superscope, Inc., supra*, 39 Cal.3d 18, 29].). Neither circumstance is present in the instant case.

[6] [Footnote Omitted]

agreement. The hotel was eventually sold as a result of the broker's efforts, but he was not paid a commission. This court accepted the trial court's findings that the defendant had promised to pay the broker a commission and that the broker was the procuring cause of the sale, but decided that the broker was not entitled to recover a commission because his agreement did not comply with the statute of frauds. "The plaintiff, a man of experience in this line of business, knew how to protect himself in the transaction but failed to do so." (*Id.*, at p. 823.)

We believe the distinction between licensed brokers and unlicensed finders remains valid. We are not alone. Many "courts distinguish between persons in the traditional categories [of the statute of frauds] and brokers, who are assumed to be familiar with the laws governing their occupation." (Rest.2d Contracts (1981) §126, reporter's note, p. 317.) An applicant for a broker's license must demonstrate by written examination that he or she has an understanding of "the general purposes and general legal effect of agency contracts." (Bus. & Prof. Code- §10153.) To obtain an original broker's license, an applicant must have been a licensed and actively employed real estate salesperson for at least two years. (Bus. & Prof Code, § 10150.6.) The Legislature his recently increased the educational requirements to obtain a broker's license to include mandatory successful completion at an accredited institution of a course in the legal aspects of real estate (Bus. & Prof. Code, § 10153.2, subd. (a).) To renew their licenses, brokers must now successfully complete continuing professional education courses including legal study. (Bus. &. Prof -Code. f 10170.5.) [7] The requirements that licensed brokers know the law is stronger than ever before. Licensed brokers are conclusively presumed to know the requirements of section 1624(d).

* * *

The alternate basis for estoppel is unjust enrichment. Phillippe has not shown any unjust enrichment of Shapell. The most Phillippe has shown is that Shapell did not pay for his services. The fact that a broker's principal does not pay for the broker's services under an unenforceable oral contract does not constitute unjust enrichment sufficient to support equitable estoppel. In *Marks v. Walter G. McCarty, supra*, 33 Cal. 2d 814, the court denied recovery to a broker under an oral contract despite having accepted the trial court's finding that the broker was the procuring cause of the sale. (12) (See fn. 11.) Likewise here, the jury's finding that Phillippe was the procuring cause of the sale to Shapell does not by itself establish unjust enrichment sufficient to give rise to equitable estoppel.[8]

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[7] The legal study requirements are substantial. Business and Professions Code section 10170.5 provides that the continuing education must include: "A three-hour course in ethics, professional conduct, and legal aspects of real estate, which shall include, but not be limited to, relevant legislation, regulations, articles, reports, studies, court decisions, treatises, and information of current interest." (Italics added.)

[8] "A broker is the "procuring cause" of a real estate transaction if he finds a purchaser [or seller] who is ready, willing, and able to buy [or sell] the property on the terms stated and he obtains a valid contract obligating the purchaser [or seller] on these terms." (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 820, fn. 2 [122 Cal.Rptr. 745, 537 P.2d 8651.]). Even if a finding of procuring cause could equate in some circumstances are present in this case. Phillippe's last attempts to bring about a sale of the Great Lakes property to Shapell were in early 1974. Although the property was rezoned in February 1974 to a construction density that was acceptable to Shapell nothing more happened until the end of 1975 when Shapell's vice president contacted the property owner and learned the property was still available. Direct negotiations between the owner and Shapell led to the eventual sale. Shapell's refusal to

To determine that mere nonpayment constitutes unjust enrichment sufficient for estoppel would also conflict with consistent holdings that licensed brokers, who cannot recover under oral agreements invalid under the statute of frauds, are also prohibited from recovery in quantum meruit for the reasonable value of their services. (*Beazell v. Schrader* (1963) 59 Cal.2d 577, 582 [30 Cal.Rptr. 534, 381 P.2d 390]; *Jamison v. Hyde* (1903) 141 Cal. 109, 113 [74 P. 695]; *Augustine v. Trucco, supra*, 124 Cal.App.2d 229, 237-238.) "[T]he purpose of the statute would be largely defeated if the broker should be allowed to recover in quantum meruit for his services . . ., either on the oral contract itself or in quasi-contract for reasonable compensation. This is made obvious by the fact that reasonable compensation would be determined by the commission that is customarily paid in the community, and the oral contract that the broker alleges to have been made is practically always a contract to pay this customary commission." (2 Corbin on Contracts (1950) § 416, p. 438.) The quantum meruit theory of recovery in these circumstances "has been so roundly rejected by the [California] courts that many recent attempts by brokers to recover commissions do not even raise it." (Cal. Real Property Sales Transactions (Cont.Ed.Bar 1981) § 2.55, p. 110.) The authors of the Restatement Second of Contracts reached the same conclusion. Section 375 states: "A party who would otherwise have a claim in restitution under a contract is not barred from restitution for the reason that the contract is unenforceable by him because of the Statute of Frauds *unless the statute provides otherwise or its purpose would be frustrated by allowing restitution*." (Italics added.) Comment a, illustration 3 of section 375 expressly states that recovery in restitution by a real estate broker would frustrate the purpose of the statute. The overwhelming majority of other jurisdictions has adopted the Restatement view. (See Annot. (1955) 41 A.L.R.2d 905, 908; 7 Powell, The Law of Real Property (Rohan ed. 1987) 938.16[3], pp. 84C-56 to 84C-63.) If nonpayment is insufficient to allow recovery in quantum meruit, nonpayment is equally insufficient to support equitable estoppel on the ground of unjust enrichment.

There would be no point in deciding, as we have, that a licensed broker cannot show an unconscionable injury sufficient to assert estoppel based only on the fact that the broker performed services without payment, but then to conclude that the nonpayment constitutes unjust enrichment sufficient to allow estoppel. A dissatisfied broker could prevail by merely labeling his theory of recovery as unjust enrichment rather than unconscionable injury.

We hold that a licensed real estate broker or salesperson cannot assert equitable estoppel against a statute of frauds defense to an oral commission agreement that is subject to Civil Code section 1624(d) unless there is a showing of actual fraud by the party to be charged under the invalid oral agreement. Because licensed brokers are involved in almost every real estate sale, to decide otherwise would be to eviscerate if not abrogate section 1624(d).

*Sound Policy Reasons Support the Denial of Equitable Estoppel to a Licensed Broker.*

The original statute of frauds was enacted in England more than 300 years ago. (An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, ch. 3.) Variations of the original English statute have been widely enacted in the United States. The State of California first

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pay Phillippe a real estate commission does not rise to the level of unjust enrichment in light of the fact that the sale was consummated approximately one and one-half years after Phillippe's involvement had ceased and was negotiated directly between the seller and Shapell without assistance from Phillippe.

enacted its version in 1872. The Legislature expanded the statute in 1878 to include real estate commission agreements. Despite much criticism, section 1624(d) remains effective more than a century after its passage. Whatever else it may be, section 1624(d) is durable.

The statute of frauds is also indisputably significant. It has been characterized as, "the most important statute ever enacted in either country [England and the United States], relating to civil affairs." (Bishop, Law of Contracts (1878) § 498, p. 177.) By acknowledging the statute's importance we do not express our opinion as to its worth. Whether this court likes section 1624(d) is not relevant to our decision. We have no prerogative to create an exception that would effectively render this durable and important statute a nullity. (13) "Courts may not read into a statute an exception not incorporated therein by the Legislature [citation omitted], unless such an exception must reasonably and necessarily be implied . . . ." (*Pacific Motor Transport Co. v. State Bd. of Equalization* (1972) 28 Cal-App.3d 230, 235 [104 Cal.Rptr. 558]; cf. Estate of Banerjee (1978) 21 Cal.3d 527, 540 [147 Cal.Rptr. 157, 580 P.2d 657] [exceptions to a general provision of a statute are strictly construed].) If section 1624(d) should be modified, the Legislature can do so.

We believe the legislative preference for written contracts is stronger than ever before. The Legislature has demonstrated with increasing frequency its desire to provide consumers with the security and certainty of written contracts in a wide variety of transactions. This legislative trend is not new. More than 20 years ago, a commentator noted that, "[n]otwithstanding what appears to be a disfavorable attitude of the courts towards the Statute [of Frauds], the legislative trend has been in the direction of expanding rather than restricting the scope of the writing requirement." (Comment, *Equitable Estoppel and the Statute of Frauds in California, supra*. 53 Cal.L.Rev. 590, 592, fn. 15.) A brief list of consumer contracts now required to be in writing demonstrates this clear legislative purpose: home improvement contracts in excess of $500; (Bus. & Prof Code, § 7159, enacted 1969); mobilehome sales (Health & Saf. Code, § 18035.1, enacted 1981); prepaid rental listing services (Bus. & Prof Code, § 10167.9, enacted 1980); home solicitation contracts (Civ. Code, § 1689.7, enacted 1971); automotive repairs (Bus. & Prof. Code, § 9884.9, enacted 1971); dance studio lessons (Civ. Code, § 1812.52, enacted 1969); health studio services (Civ. Code, § 1812.82, enacted 1962); discount buying services (Civ. Code, § 1812.107, enacted 1976); funeral services (Bus. & Prof. Code, § 7685.2, enacted 1971); and attorney fee contracts (Bus. & Prof. Code, § 6147, as amended 1986, and § 6148. enacted 1986). There are other examples too numerous for recitation.

Section 1624(d) can equally be characterized as a consumer protection statute, perhaps this state's first. The essential purpose of the statute is reflected in the very title of its English precursor, "An Act for Prevention of Frauds and Perjuries." The purchase or sale of real estate, especially a home, is always a significant event. For most people, such purchase or sale is probably the single most important financial transaction in their lives. Commercial real property transactions are of similar importance to the parties involved. Section 1624(d) manifests a valid legislative intent to protect real estate buyers and sellers from unfounded claims for brokers' commissions. The statute of frauds also serves a cautionary purpose. By requiring a writing, the statute serves to emphasize to contracting parties the significance of their agreement. The importance of real estate transactions makes this aspect of the statute especially salutary.

Faced with a clear legislative desire for written contracts in a wide variety of contexts and the special significance of real estate transactions, we cannot conclude that section 1624(d) is a legislative anachronism that should be judicially swept away. In *Buckaloo v. Johnson, supra*, 14 Cal.3d 815, which also involved a licensed broker's commission, the court made clear that, "[t]he statute of frauds conclusively establishes that brokerage contracts with either the vendor or the vendee must be in writing. We have neither the authority nor the inclination to circumvent that declared policy . . . ." (*Id.*, at p. 827.) Our view has not changed.

It is not unfair to require licensed brokers to comply with the statute of frauds. Only those persons licensed by the California Department of Real Estate may lawfully act as real estate brokers in this state. (Bus. & Prof. Code, § 10130.) To bring an action to recover a real estate commission, a broker must plead and prove that he was duly licensed at the time his cause of action arose. (Bus. & Prof. Code, § 10136.) The effect of these laws is obvious -- only a person duly licensed may earn and recover compensation as a real estate broker. It is not too much to ask in return for that valuable privilege that a licensed broker comply with the statute of frauds.

Section 1624(d) is perhaps more fairly applied now against brokers than when first enacted. Brokers were not then required to be licensed, and they may have had little or no legal knowledge. Application of section 1624(d) might have come as a surprise a century ago. In view of the current educational requirements, a broker cannot be surprised by section 1624(d).

Phillippe, the California Association of Realtors as amicus curiae, and various commentators contend that brokers are often not in sufficiently strong bargaining positions to obtain written employment contracts from their principals and suggest that this disparity of bargaining power is most common in the commercial real estate market. Phillippe urges that section 1624(d) should not bar recovery on an oral contract in that situation because the statute is contrary to industry custom and practice. We reject that contention for several reasons.

Section 1624(d) does not include an exception based on the relative bargaining strength of the parties to a contract. Any such exception must be created by the Legislature, not by this court. If the Legislature believes that section 1624(d) is not workable in the real estate marketplace, the Legislature can act accordingly.[9] Even if we had the prerogative and inclination to create judicially such an exception, we have been provided with no factual basis for doing so. Phillippe did not introduce any evidence that there was an inequitable disparity between himself and Shapell. Amicus curiae and the legal commentators also cite no facts, and we are unaware of any, that support their criticism that the marketplace and the statute are in conflict. We decline to create a major exception to section 1624(d), and in so doing set aside decades of precedent, based on the unsupported assertions of the statute's critics.

The lack of evidence aside, we are not persuaded that section 1624(d) is inappropriate merely because there may be a disparity of bargaining power between a broker and his principal.

[9] That such change is within the Legislature's purview is demonstrated by its enactment of California Uniform Commercial Code section 2201, the statute of frauds applicable to sales of goods. Subdivision (2) of that statute provides special, somewhat relaxed, standards for written contracts in transactions between merchants. By enacting that provision the Legislature changed California law regarding sales of goods. (See 23A West's Ann. Cal. U. Code 91964 ed.) §2201. com. 5, p. 129.) The Legislature can also change section 1624(d).

The resolution of disputes would be complicated. Even defining bargaining power would be troublesome. Would it include legal knowledge and commercial sophistication? If so, how would a court measure those factors? Would it include financial strength? If so, to determine whether there was a disparity, a court would likely have to conduct a detailed examination of the parties' respective financial conditions thus creating a need for considerable pretrial discovery and protracted litigation.

Those engaged in real property transactions ordinarily desire certainty in their financial dealings. If bargaining power were relevant, the parties would not know (and could not know) at the time of entering into an oral agreement whether it would be an enforceable contract. Each party would have to speculate as to whether he possessed some quality, e.g., finances, knowledge, or even better negotiating skills, that created an imbalance in bargaining power. Whenever a dispute arose, a court would then have to determine whether there was a disparity of power. To hold that the validity of a commission agreement depends on relative bargaining power would lead to great uncertainty. We believe a distinction based on disparity of bargaining power would lead to unnecessary complexities.

We are also not persuaded that section 1624(d) should be disregarded in a commercial setting. That suggestion is premised on the unsupported allegation that written commission agreements are often not used in commercial real estate transactions.[10] No evidence is before us regarding industry custom. We decline to speculate as to what the custom, if any, may be.[11]

We are inclined to believe that the business community in general may favor written contracts. They provide certainty and predictability. In the only empirical study we have been able to locate, more than half of the businesses (manufacturers) surveyed favored enforcement of only those agreements that comply with the statute of frauds, and almost two-fifths favored a change in the law to make even fewer agreements enforceable. (Comment, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices* (1957) 66 Yale L.J. 1038, 1058.) More than 50 years ago, one of the leading commentators on contracts observed that the statute of frauds was even then becoming more useful due to the increasing volume and complexity of commercial transactions. (Llewellyn, *What Price Contract? -- An Essay in Perspective* (1931) 40 Yale L.J. 704, 747.) The commercial world is now even more complex, and Llewellyn's observation appears to remain sound, perhaps more so than when he made it. The business community's preference for written contracts was stated most colorfully in the memorable malaprop attributed to motion picture producer Samuel Goldwyn: "An oral contract isn't worth the paper it's written on." (Shavelson, *Hollywood Signs: Movie Moguls "Who Gave the Golden Era Its Shine*, L. A. Times (July 27, 1986) Calendar Section, p. 24.) Written contracts appear to have diverse, substantial support.

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[10] Philippe and his fellow critics of section 1624(d) do not explain what they mean by "commercial transactions." We assume for purposes of discussion that they mean transactions between businesses engaged primarily in real estate investment. We note, however, that a consistently workable definition of "commercial transactions" would be extremely difficult to formulate. Such definition might cover the spectrum from a sophisticated land developer buying undeveloped land to an individual buying a vacation home for investment purposes.

[11] The assertion that written contracts are not often used may be incorrect. The use of oral commission agreements is apparently viewed as unprofessional by many in the real estate industry. (Bowman & Milligan, Real Estate Law in Cal. (7th ed. 1986) § 3.14, p. 53.)

Last and most important, there is no exception for commercial transactions stated in the statute. An unequivocal statute must take precedence over mere custom. Indeed, the widespread custom of not using written contracts in real estate transactions was apparently a reason why section 1624(d) was enacted in the first instance.

* * *

*CONCLUSION*

We hold that Phillippe's alleged oral commission agreement is invalid under section 1624(d). Phillippe cannot avoid the requirements of section 1624(d) by asserting equitable estoppel. We reverse the judgment in all respects and remand with directions to enter judgment including costs on appeal in favor of Shapell. In light of our decision, we need not address the issues raised by Phillippe in his cross-appeal.

Lucas, C. J., Arguelles, J., Roth (Lester Wm.), J.,* and Woods (Arleigh M.), J.,† concurred.

**KAUFMAN, J.** -- I respectfully dissent.

The majority opinion broadly holds that except in cases of actual fraud, a licensed real estate broker may not assert equitable estoppel to avoid the statute of frauds -- regardless of the particular facts and circumstances of the case, of the relative equities of the parties, or of the injustice that may result absent an estoppel. Neither settled law nor sound public policy supports such a harsh and inflexible rule. My views on the matter are set forth below.

The first statute of frauds was enacted several hundred years ago to prevent "many fraudulent practices . . . ." (An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, ch. 3 (1677).) Its function in modern society has been described as two-fold: first, "evidentiary," in the sense that a writing obviates the opportunity for fraud through perjury and limits disputes over whether a contract has been formed or over the terms thereof, and second, "cautionary," on the theory that a writing serves to prevent hasty bargains and impresses upon the parties the solemnity of the agreement. (See Comment, *Equitable Estoppel and the Statute of Frauds in California* (1965) 53 Cal.L.Rev. 590, 591.) Thus as the majority opinion points out, the statute of frauds enjoys continued vitality today in the form of numerous and varied consumer protection statutes. (Majority opn., ante, at p. 1265.) And both evidentiary and cautionary functions are clearly well served by provisions such as the one at issue here, subdivision (d) of Civil Code section 1624 (hereafter section 1624(d)), which provides, inter alia, that agreements authorizing a broker to find a purchaser or seller of real estate must be in writing and signed by the party to be charged. As the majority opinion notes, section 1624(d) serves both to "protect real estate buyers and sellers from unfounded claims for brokers' commissions . . .", as well as to impress on "contracting parties the significance of their agreement" (Majority opn., *ante.* at p. 1266).)

The doctrine of equitable estoppel developed out of the recognition that equity must occasionally estop the assertion of the statute of frauds precisely in order to prevent the perpetration of a fraud. (See *Colon v. Tosetti* (1910) 14 Cal.App. 693, 695 [113 P. 365] ["The statute of frauds is for the prevention, not in aid of the perpetration, of fraud."].) In Monarco v. Lo Greco (1950) 35 Cal.2d 621, 623-624 [220 P.2d 737], this court established and explained the

modern doctrine as follows: "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract [citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. [Citations.] In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations. [Citations.]" (Italics supplied.)

Under the broad equitable principles set forth in *Monarco*, the trier of fact exercises considerable discretion in determining whether to enforce the statute of frauds or to estop its effect in the interests of justice. (See Mehl v. People ex rel. Dept Pub. Wks. (1975) 13 Cal.3d 710, 715-716 [119 Cal.Rptr. 625, 532 P.2d 489] [Estoppel is a question of fact, and the determination of the trier of fact is binding on appeal unless the contrary conclusion is the only one that can reasonably be drawn from the evidence."].) Each case requires a balancing of the interests of the plaintiff that would be lost through enforcement of the statute against the interests of the state that the statute was designed to protect. (*Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 219-220 [45 Cal.Rptr. 878, 404 P.2d 486]; Macaulay, *Justice Traynor and the Law of Contracts* (1961) 13 Stan.L.Rev. 812, 828, fn.46 ["The new position [under *Monarco*] calls for a case-by-case definition of when reliance is 'unconscionable' and when enrichment is `unjust.'"].)

Nothing in the holding or the reasoning of Monarco, supra. 35 Cal.2d 621, suggests that the general equitable principles set forth therein were meant to be limited to any particular class of contracts or group of plaintiffs. Indeed, as this court wrote years earlier in *Seymour v. Oelrichs* (1909) 156 Cal. 782 at page 795 [106 P.88]: "We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked."' (See also Moore v. Day (1954) 123 Cal.App.2d 134, 138-139 [266 P.2d 51].) Although the doctrine of equitable estoppel has certainly expanded since *Seymour v. Oelrichs* was decided, nothing we have said or intimated since then has indicated an intent to reverse that holding or to prohibit use of the equitable doctrine in the context of any particular class of contracts within the statute of frauds.

Nevertheless, the notion has gained currency among the Courts of Appeal, partly in reliance on this court's decision in *Pacific etc. Dev. Corp. v. Western Pacific P.R. Co.* (1956) 47 Cal.2d 62 [301 P.2d 825], and partly on the basis of the public policy underlying section 1624(d), that licensed real estate brokers are precluded as a matter of law from invoking equity to estop the assertion of section 1624(d). Neither settled law nor sound public policy supports this conclusion.

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Notwithstanding the absence of any compelling legal authority, the majority opinion concludes that a rigid application of section 1624(d) is nevertheless compelled by reasons of public policy. Because of their training and experience, licensed brokers are presumed to know that contracts for real estate commissions must be in writing. (*Pacific, supra*, 47 Cal.2d at p. 70.) Section 1624(d) is thus designed to protect buyers and sellers of property from possible exploitation by licensed brokers asserting false claims for commissions. (*Pacific, supra*, 47 Cal.2d at p. 70.)

I certainly have no quarrel with either of these propositions; the relative sophistication of the broker and the prophylactic purposes underlying the statute are undeniably relevant factors to be considered in balancing the respective equities in any given case. However, as this court has recently recognized in circumstances strikingly similar to those in the case at bar, the policies underlying the statute of frauds are not uniformly implicated in every case, and in any event such policies must be considered in light of the equitable interests of the plaintiff and the economic realities of the particular transaction. (See *Asdourian v. Araj* (1985) 38 Cal.3d 276, 292 [211 Cal.Rptr. 703, 696 P.2d 95].)

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The majority opinion recites the *facts* well enough, but because of its conclusion that section 1624(d) precludes equitable relief as a matter of law, it ignores the story they tell. Defendant, Shapell Industries, Inc., is a publicly traded corporation engaged in the development of residential subdivisions and, as such, is continually engaged in the acquisition of land for that purpose. Although Shapell employed a well-trained staff to locate and acquire property (both Shapell and its vice president, Joseph Aaron, were licensed brokers), it relied to a large extent on outside brokers for leads. Because of its experience and expertise, however, Shapell generally used its own staff to negotiate the terms of sale directly with the property owners.

Shapell became acquainted with Phillippe, a licensed real estate broker, in 1972 when it purchased a 78-acre parcel of land on which Phillippe was the listing agent and paid Phillippe $153,100 for his services as broker. Thereafter, in January 1973, *Shapell contacted Phillippe* to engage his services in locating parcels in excess of 50 acres on the Palos Verdes Peninsula. Phillippe explained that he had no listings in that area and that his commission would have to be paid by Shapell as the buyer. Shapell agreed, orally promising to pay Phillippe a commission for any land submitted by him and purchased by Shapell, and also promising that his commission would be stated in any written offer made by Shapell to a seller.

Phillippe thereupon proceeded to familiarize himself with the Palos Verdes Peninsula, inspecting the area for vacant parcels, researching the land records and establishing contact with property owners and their representatives. In April 1973, Phillippe wrote to Shapell about a parcel of land owned by the Filiorum Corporation, stating in conformity with the master oral agreement his "understanding that Buyer will pay our firm a commission, which, when added to the net price of the land, will equal 6% of the total consideration." Shapell responded in early May with an offer to purchase the Filiorum *property that faithfully conformed to the oral agreement*, stating as promised that the buyer, Shapell, agreed to pay a commission to Phillippe's firm equal to 6 percent of the total consideration.

Although the Filiorum deal eventually fell through, *Shapell asked Phillippe to continue his work on the Palos Verdes Peninsula*. Several months later, in August 1973, Phillippe wrote to Shapell again, informing the company of four additional properties which met Shapell's requirements, including a ninety-four-acre parcel located in the City of Rolling Hills Estates belonging to Great Lakes Properties. As he had previously done pursuant to the general oral agreement, Phillippe restated in his letter the ongoing fee agreement, to wit, that the "properties [were] presented with the understanding that Buyer agrees to pay [Phillippe] . . . a commission which when added to the net purchase price of the land will equal 6 percent of the total consideration . . . ." Phillippe received no written reply to the August letter.

The primary obstacle to the Great Lakes purchase proved to be not the asking price but the fact that the property was zoned for low density housing. Accordingly, Phillippe continued to work on the Great Lakes deal throughout 1973 and early 1974, meeting or talking on a regular basis with representatives of Shapell, the planning and zoning department of the City of Rolling Hills and the owner of the property. Phillippe's contact at Shapell during this period was Bill Snow, vice president of land acquisitions. Snow testified that in one of his early meetings with Phillippe the latter had reminded him that he had no listing with the seller and expected to receive payment from Shapell; Snow recalled that he told Phillippe such payment was "not a problem as long as the deal [was] otherwise satisfactory." He recalled: "We occasionally pa[id] the broker's commission, the buyer did . . . if a broker brought a good piece of land to me and I ended up buying it, I saw to it that he got compensated." It was Snow's specific understanding that "*there was an agreement to pay [a] commission [to Phillippe] if we bought the property*."

Phillippe continued his efforts to facilitate a sale during the early months of 1974. In January, he met with the representative of the property owner and obtained a copy of an engineering study showing the feasibility of a higher density project, which he passed on to Shapell together with a cover letter updating Shapell as to the current status of negotiations and progress before the planning commission. Phillippe continued to monitor the planning commission and in February informed Shapell of the commission's decision to grant the rezoning. In April, Ron Prince, an employee of Shapell, *called Phillippe* for an update on the property and mentioned that the project was being turned over to Joseph Aaron, a vice president of Shapell and a licensed broker himself. In a letter dated April 22, 1974, addressed to Mike Steponovich, vice president of Great Lakes Properties, Phillippe stressed that Shapell was interested in the purchase and "ha[d] the full capability to close the escrow." The letter closed as follows: "You may want to remind Joe Aaron that we have been working with you at the request of Shapell over a period of time." The letter indicated that a courtesy copy was being sent to "Ron Prince - Shapell Industries."

In late April, Phillippe phoned Aaron to explain what had transpired in the negotiations thus far. In a follow up letter addressed to Aaron and dated April 30, 1984, Phillippe reviewed the prior negotiations concerning the Great Lakes property and reminded him of the commission agreement, stating: "The commission arrangement on these properties between our firm and Shapell is spelled out in the August 9, 1973, letter [to Prince]."

Several subsequent attempts by Phillippe to discuss the sale with Aaron were rebuffed. Shapell eventually purchased the Great Lakes property in August 1976; the offer did not provide for any commission to Phillippe.

The story that emerges from these facts may be summarized as follows: Shapell, a major firm engaged in the acquisition and development of real property, contacted Phillippe, the proprietor of a small brokerage firm; Shapell engaged Phillippe to locate properties on the Palos Verdes Peninsula pursuant to a general oral agreement to pay a commission for any property that Phillippe located and Shapell purchased; in reliance on the agreement, Phillippe engaged in a concentrated effort to locate properties in the area with Shapell's full knowledge and implied encouragement; although no purchase resulted from Phillippe's locating the Filiorum property, Shapell did, as promised, provide in its offer for a 6 percent commission to be paid to Phillippe, thereafter, Shapell reaffirmed its desire for Phillippe to continue his efforts to locate properties and, through its employee Bill Snow, reconfirmed the master oral agreement to pay a commission with respect to the Great Lakes property; in reliance thereon, Phillippe continued to work on facilitating the Great Lakes deal, meeting or talking regularly with representatives of the city, the property owner and Shapell; Shapell employees were kept informed of and encouraged Phillippe's efforts to facilitate its purchase of the Great Lakes property; Phillippe, both orally and in writing, frequently reminded Shapell of the terms of the oral commission agreement, yet Shapell *never once demurred* to Phillippe's repeated affirmations of the oral commission agreement until shortly before the Great Lakes purchase was consummated.

It is difficult to conceive a more suitable occasion for the assertion of equitable estoppel. Clearly, both tests of estoppel, unconscionable injury *and* unjust enrichment, are present. The principal, Shapell initiated the contact with Phillippe and not only induced reliance, but continually monitored and encouraged his performance. Furthermore, Shapell reaffirmed its original commitment to the general oral agreement, first in writing (in connection with the Filiorum deal), then orally (in connection with the Great Lakes property) and finally through silent acquiescence as Phillippe labored and periodically sought confirmation of the oral understanding. Under the circumstances, failure to enforce the contract would clearly result in unconscionable injury.

It is true that Phillippe, as a licensed broker, must be presumed to have been aware of the requirement of a written contract. As we recognized in *Asdourian* however, such presumed knowledge merits far less consideration when the principal, as here, is not only as sophisticated as the broker, but exercises even greater economic leverage. In this factual context, enforcement of the oral contract does not impair the policy of the statute. (*Asdourian v. Araj, supra*, 38 Cal.3d at pp. 292-294.)

Moreover, it is clear that Phillippe fully performed according to the oral agreement, and that Shapell richly profited from that performance. Under the circumstances, if Shapell is allowed to retain the benefits of Phillippe's performance without paying the agreed upon commission, Shapell will be unjustly enriched. ". . ."

As I stated in the beginning, it is axiomatic that the statute of frauds "is for the prevention, not in aid of the perpetration, of fraud. It is to be used as a shield, not as a sword." (*Colon v. Tosetti, supra*, 14 Cal.App. at p. 695, italics supplied.) The holding of the majority opinion inverts this principle, wielding the statute as a sword in the name of "public policy" to condone an obvious injustice. As the facts in this case demonstrate, however, public policy is not seriously implicated and "would not be effectively served by allowing such an inequity." (*Asdourian v. Araj, supra*, 38 Cal-3d at p. 294.) Accordingly, I would affirm the judgment.

## NOTES AND QUERIES

1. Both the majority opinion and the dissent in *Phillippe* were written by justices generally regarded as politically conservative. Despite such labels, however the two opinions reflect very different judicial philosophies concerning the role of law, equity and the courts. How would you characterize the differences? Should judges be more concerned about achieving justice in the particular case before them or about articulating clear and consistent rules of conduct? Is the latter role more properly a legislative role? What exactly did Justice Kaufman mean by his frequent references to "equity?"

2. Can you see any connection between the decision in *Phillippe* and the pervasive concern about impossible case loads and delays in civil and criminal trials?

3. Does *Phillippe* have implications outside of the brokerage area? If so, what are those implications?

4. Should a real estate licensee be able to step outside of that role and act in the capacity of, for example, a "finder" or a "consultant?" If not, why not?

5. Although a broker is well advised to obtain a written contract in light of *Phillippe v. Shapell*, if a broker does work on an oral basis and loses his commission to sharp dealing by the buyer and seller, the broker is not necessarily entirely without legal recourse. The broker may still have a cause of action for interference with prospective economic advantage. *Buckaloo v. Johnson* (1975) 14 Cal.3d 815 (cited by the *Phillippe* court in reaffirming the vitality of the statute of frauds) discusses interference with a prospective economic relationship vis-á-vis the statute of frauds as applied to brokers. In *Buckaloo* a broker was working under an oral listing agreement with the seller and procured a buyer. However, the buyer and seller decided to deal

with one another directly, and without compensation to the broker. Although the broker could not pursue the seller on the unenforceable oral contract, he prevailed against the buyer based on the theory of interference with prospective economic relationship. The court held the interference actionable despite the fact that the relationship had not "attained the dignity of a legally enforceable agreement." *Id.* at 827. The key issue in an interference case is not whether the contract was enforceable but the probability that it would have been honored, absent interference, despite the availability of technical defenses.

6. Commission splits between the listing broker and the so-called "cooperating broker" (typically but not inevitably acting for the buyer) present their own unique issues concerning compensation. *Enea v. Coldwell Banker/Del Monte Realty* (N.D. Cal. 1998) 225 B.R. 715, is a district court decision applying California law to deny a commission split to a cooperating broker who had no writing confirming his right to a commission. In so holding, the District Court adopted an approach every bit as strict as the *Phillippe* court's. As the District Court saw things: "[a]ny right to compensation asserted by a real estate broker must arise from the four corners of the employment contract, which is strictly enforced according to its lawful terms;" and "[w]hen the cooperating broker is the procuring cause of the sale, his recovery from the listing broker is limited to the terms of the cooperation agreement." *Id.* at 717.

7. For a fascinating case which, according to the Court of Appeal, involved the "largest single sale of commercial properties in Los Angeles history," *see Greenwood & Co. Real Estate v. C-D Investment Co.* (1993) 12 Cal.App.4th 1459. *Greenwood* involves extensive discussion (including a dissent) about the statute of frauds, conspiracy to interfere with a commission and the creative use of business entities in an effort to avoid a commission. The opinion reflects a more benign attitude toward brokers than is reflected in *Phillippe*.