



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

Volume 10 | Issue 2

Article 7

3-1-2004

The Requirement of Statute of Frauds for Real Estate Brokers to Receive Commissions and the Festering Minority View of Equity

Stephanie Councilman

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Stephanie Councilman, *The Requirement of Statute of Frauds for Real Estate Brokers to Receive Commissions and the Festering Minority View of Equity*, 10 Tex. Wesleyan L. Rev. 441 (2004).
Available at: <https://doi.org/10.37419/TWLR.V10.I2.6>

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COMMENTS

THE REQUIREMENT OF STATUTE OF FRAUDS FOR REAL ESTATE BROKERS TO RECEIVE COMMISSIONS AND THE FESTERING MINORITY VIEW OF EQUITY

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I. INTRODUCTION

New cases arise quite regularly regarding real estate brokers dealing with the issues of employment and their rights to compensation. Because brokerage commission cases are seen frequently by judges in every jurisdiction, it is important to note the law and the views among the states as to the treatment of this issue. Of particular interest is the fact that some jurisdictions, including Arizona, California, Hawaii, Rhode Island, and Texas, are seemingly ignoring brokerage statutes in favor of quantum meruit.¹ The complete deviation from the law by some jurisdictions is the focus of this Comment.

Consider a simple case of a real estate broker who brought the buyer and seller together and sues to recover her commission when that right to collect commission was not in writing nor signed by the seller. Should the broker be entitled to a commission even though there is no writing evidencing such a sale? Consider further that the court holds that as long as the broker procured a ready, willing, and able buyer then the broker was entitled to collect her commission even without a written contract evidencing that right.

On the face of this scenario it seems as if the court held correctly; actually, half of the states would agree with this holding.² But, assume that the jurisdiction where the case arose also requires the broker to have a written agreement signed by the party that will pay the commission (usually the seller) in order to collect the brokerage commission. Is the court still correct in its holding? The answer seems clear: if a jurisdiction has a Statute of Frauds requirement, then it should first be determined whether or not a written contract exists between the broker and the seller. If there is no writing, then there is no reason for a court to jump to the second inquiry: whether the broker procured a ready, willing, and able buyer. Surprisingly, a minority of courts around the nation are disregarding the Statute of Frauds requirement in favor of equity. Are these courts really choosing equity, or are they simply ignoring the relevant statutes?

The Statute of Frauds was enacted in the English Parliament in 1677 and required certain contracts, including those involving real estate transactions, to be in writing.³ Land ownership was very important to the early English nobility because it was a way to define status in society.⁴ The writing requirement was considered to be sufficient to protect the seller's and buyer's interests.⁵ There are two main historic purposes of the Statute of Frauds: (1) to prevent the occurrence of

1. See discussion *infra* Part IV.B.

2. 10 PATRICK J. ROHAN ET AL., REAL ESTATE BROKERAGE LAW & PRACTICE § 2.03[3], at 2-42, n.60 (2002).

3. GEORGE J. SIEDEL, III, ET AL., REAL ESTATE LAW 206 (5th ed. 2003).

4. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS 146-47 (1998).

5. See *id.* at 146.

fraud against an innocent “party on the false assertion that an agreement to sell land had been reached, when in fact” there was no such agreement, and (2) to protect the social status of the landowner by evidencing the landowner’s intent to purposefully part with his land.⁶

The Statute of Frauds covering contracts that must be in writing is comprised of five different types, including a contract on the “sale of lands, tenements, or hereditaments, or any interest in or concerning them.”⁷ Many legislatures have, over time, added specific language to the Statute of Frauds to include brokerage agreements.⁸ The inclusion of such language in statutes was in direct response to the numerous claims brought by brokers, sellers, and buyers of real estate.⁹ The adoption of the statutes was “to avoid surprise or confusion to the principal concerning his or her obligations.”¹⁰

Generally, the Statute of Frauds prevents “the enforcement of oral agreements unless there is a writing signed by the party to be charged,”¹¹ and in terms of brokerage agreements, the same goal was to be accomplished by extending the written requirement to the commission statement.¹² In some states, the brokerage listing agreement is included within the Statute of Frauds and, therefore, it also must be in writing.¹³ States that require some form of Statute of Frauds in real estate transactions require that the names of the parties, the percentage of commission, and an exact description of the property be included in the listing agreement.¹⁴ The Statute of Frauds requirement does not insist that the writing be formal.¹⁵ The writing requirement in a contract for the sale of land can be satisfied by a “memorandum [that] set[s] out the essential terms such as the names of the parties, a description of the property, and the intent to buy and sell.”¹⁶

Approximately half of the states have some form of Statute of Frauds requirement governing the ability of a real estate broker to

6. *See id.*

7. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 68, at 341 (4th ed. 2001).

8. ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW 155 (1987).

9. *See id.* (citing 2 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 416 (5th prt. 1979 & Supp. 1997)).

10. *Id.* The Supreme Court of Arizona stated that legislatures have included brokerage agreements in the Statute of Frauds because “[i]t was thought that the parties should reduce to writing their agreement and not rely upon the uncertainties of their memories as to what the understanding and agreement was.” *Murphy v. Smith*, 226 P. 206, 207 (Ariz. 1924).

11. MALLOY & SMITH, *supra* note 4, at 133.

12. *See* BENJAMIN N. HENSZEY & RONALD M. FRIEDMAN, REAL ESTATE LAW 109 (2d ed. 1984).

13. SIEDEL, III ET AL., *supra* note 3, at 163.

14. *Id.*

15. *See* MALLOY & SMITH, *supra* note 4, at 146 (explaining that inclusion of all the parties’ terms is not required by the Statute of Frauds).

16. *Id.*

collect the brokerage commission.¹⁷ The purpose of this requirement is to protect the seller from unscrupulous brokers who argue that they have procured a sale when in fact no sale of property ever took place.¹⁸ The listing agreement and contract both serve as vital evidence in determining whether an agreement actually occurred.¹⁹ States that require a written agreement have a two-step process in determining whether or not the broker is entitled to a commission.²⁰ The first inquiry is whether a written agreement exists that is signed by the party to be charged, and the second inquiry is whether the broker procured a ready, willing, and able buyer.²¹

A minority of the states that require some form of a written agreement are simply ignoring the statute as evidenced by their avoidance of the first inquiry altogether (whether there is a written agreement), and instead, focusing only on the procuring cause question in favor of equity.²² While equity and quantum meruit are valuable alternatives to some failed contracts, they are not warranted in cases dealing with licensed real estate brokers who fail to get commission statements in writing because, as licensed professionals, these brokers should be required and expected to follow their guidelines in order to protect themselves as well as the seller or buyer.

Part II of this Comment will discuss real estate commissions in general. Part III will discuss different views of real estate transactions across the nation. Then, in Part IV, this Comment will suggest that a festering minority of courts in states that have a Statute of Frauds requirement are currently disregarding the statutes or simply ignoring

17. The following states have a form of the Statute of Frauds: ALASKA STAT. § 09.25.010(a)(8) (Michie 2002); ARIZ. REV. STAT. ANN. § 44-101 (West 2003); CAL. CIV. CODE § 1624 (West 1985 & Supp. 2004); CONN. GEN. STAT. § 20-325a (2002); HAW. REV. STAT. § 656-1 (2002); IDAHO CODE § 9-508 (Michie 1998); IND. CODE ANN. § 32-21-1-10 (Michie 2002); IOWA CODE § 622.32 (1997); KY. REV. STAT. ANN. § 371.010 (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 32, § 13177 (West 1992); MASS. GEN. LAWS ANN. ch. 259, § 7 (West 1992); MICH. COMP. LAWS § 566.108 (1996); MINN. STAT. ANN. § 82.33 (West 1999); MONT. CODE ANN. § 28-2-903 (2003); NEB. REV. STAT. § 36-107 (2000); NEV. REV. STAT. 645.320 (2003); N.J. STAT. ANN. § 25:1-16 (West 1997); N.M. STAT. ANN. § 47-1-45 (Michie 2002); N.Y. GEN. OBLIG. LAWS § 5-701 (McKinney 2002); OR. REV. STAT. § 41.580 (2001); R.I. GEN. LAWS § 9-1-4 (1997); TEX. OCC. CODE ANN. § 1101.806(c) (Vernon 2004); UTAH CODE ANN. § 25-5-4 (1998); VA. CODE ANN. § 11-2 (Michie 1999 & Supp. 2003); WASH. REV. CODE ANN. § 19.36.010 (West 2002); WIS. STAT. ANN. § 240.10 (West 2001). "Commission" is not to be confused with "compensation." See GAUDIO, *supra* note 8, at 111. Commission refers to the productivity of the broker that produces the required result. *Id.* Compensation includes all forms of remuneration: damages that the broker may be entitled to because of an unauthorized sale or withdrawal of the property or damages for tortious acts against the broker. *Id.*

18. HENSZEY & FRIEDMAN, *supra* note 12, at 109.

19. *See id.*

20. *See* GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 52, 62-65 (3d ed. 1999).

21. *See id.* at 53, 64; *see also* discussion *infra* Part III.B (describing the majority and minority default rules regarding the ready, willing, and able buyer rule).

22. *See* discussion *infra* Part IV.

them in favor of the law of equity. Part V suggests that because some courts are ignoring the statutes, these states should reinforce their Statute of Frauds requirement by adopting language expressly stating that the statute must be followed and no commission can be granted even in quantum meruit in the absence of a written agreement.

II. REAL ESTATE COMMISSIONS

This section reviews the different aspects required in a real estate transaction. The focus will be on real estate brokers, listing agreements, and how a broker collects the brokerage commission.

A. Listing Agreements

The first document signed in a real estate transaction is the listing agreement.²³ This agreement is not an offer to sell, but it allows the broker to place the seller's property on the broker's list of properties for sale.²⁴ In this agreement, the seller designates a broker as the agent and promises to pay the broker a commission for finding a buyer willing to buy on the seller's terms.²⁵ In return for the commission, the broker promises to work diligently²⁶ in finding a ready, willing, and able buyer.²⁷ Generally, brokers are retained in order to find a buyer of the real estate and then to negotiate the purchase.²⁸ Brokers are also employed for other purposes such as locating rental property, tenants for rental property, or buyers for businesses.²⁹ The basic rights and duties of both the seller and the broker are established by the listing agreement.³⁰ Under the listing agreement, the broker does not have the authority to bind the client to a contract, but the broker only agrees to locate a buyer willing to purchase the property according to the seller's terms.³¹

Listing agreements come in three basic forms.³² The first form is an exclusive right to sell agreement, which is most often used by brokers simply because it favors the broker over the seller.³³ The exclusive

23. LEFCOE, *supra* note 20, at 52.

24. *Id.*

25. *Id.*

26. A broker works diligently when he or she exercises the reasonable skill and common prudence that the average broker with the same background would possess. *See Myers v. Adler*, 176 S.W. 538, 540 (Mo. Ct. App. 1915).

27. LEFCOE, *supra* note 20, at 52.

28. *See ROHAN, ET AL.*, *supra* note 2, § 2.02[1], at 2-17.

29. GAUDIO, *supra* note 8, at 143.

30. HENSZEY & FRIEDMAN, *supra* note 12, at 339. "The legal relationship created by the employment or listing agreement is a type of agency relationship." *Id.* at 335. Generally, "[a]n *agency relationship* results in giving one person the power to affect the contractual liability of another." *Id.* The agent (broker) acts on behalf of the principal (seller) in dealing with a third party. *See id.* at 341.

31. *Id.* at 336.

32. *See SIEDEL, III ET AL.*, *supra* note 3, at 163-64.

33. *Id.*

right to sell agreement entitles the broker to a commission even if the broker on the agreement does not find the eventual buyer.³⁴ Under this type of agreement, the broker does not actually have the right to sell the property, but rather the broker only has the right to arrange for the sale of the property.³⁵ The second type of agreement is an exclusive agency agreement where the broker is listed as the exclusive agent, but the seller is able to avoid paying a commission if the seller, instead of the broker, locates the buyer.³⁶ Finally, the open listing agreement allows the broker to act as an agent in securing a buyer for the seller.³⁷ Here, the seller reserves the right to sell the property without having to pay a commission and also reserves the right to enter into other listing agreements with other brokers.³⁸ The open listing agreement is most favorable for the seller, but it is not used as frequently as the exclusive right to sell agreement because sellers generally do not seek the advice of an attorney regarding their real estate transaction.³⁹

B. Commissions

1. Different State Requirements for Collecting Brokerage Commissions

A real estate broker must find a ready, willing, and able buyer, and then negotiate the sale of real estate in order to collect the fee or commission.⁴⁰ The listing agreement usually dictates the broker's right to commission in terms of the fee and when the broker will receive the payment.⁴¹ Generally, the seller of real property employs the real estate broker, but the broker may also be employed by the buyer and could also be employed by both the buyer and seller at the same time.⁴² There are certain prerequisites that must be met in order for a real estate broker to recover brokerage commissions: (1) the broker must prove a contract of employment;⁴³ (2) the broker must be licensed at the time of rendering services;⁴⁴ and (3) the broker must be the procuring cause of the sale.⁴⁵

Twenty-four states require a written contract evidencing the contract between the broker and the seller or buyer in order for the bro-

34. *See id.* at 163.

35. HENSZEY & FRIEDMAN, *supra* note 12, at 333.

36. SIEDEL, III ET AL., *supra* note 3, at 164.

37. *Id.*

38. *See id.*

39. *See id.*

40. *See* ROHAN ET AL., *supra* note 2, § 2.02[1], at 2-19.

41. HENSZEY & FRIEDMAN, *supra* note 12, at 339.

42. ROHAN ET AL., *supra* note 2, § 2.02[1], at 2-18.

43. *Id.* § 2.02[1], at 2-18.1.

44. *Id.* § 2.02[1], at 2-18.1 to 2-19.

45. *Id.* § 2.02[1], at 2-19.

ker to collect the brokerage commission,⁴⁶ while the rest of the states do not require that the contract be written.⁴⁷ For those states that fall in the former group, the following issues are considered when determining if the brokerage agreement is adequate: (1) the agreement must be “in writing and signed by the person to be charged with a commission”;⁴⁸ (2) the agreement “promises that a definite commission will be paid, or refers to a written commission schedule”;⁴⁹ (3) the agreement “specifies the name of the broker to whom the commission will be paid”;⁵⁰ and (4) the agreement must, “by itself or by reference to some other existing writing, identify with a reasonable certainty the land to be conveyed.”⁵¹ Further, two questions must be asked by the court when determining whether the broker is entitled to the commission.⁵² First, the court must ask whether there is a written contract signed by the party to be charged.⁵³ If the answer is yes, then the court must answer whether the broker was the procuring cause of the contract.⁵⁴ If there was no writing, then the inquiry ends, and the conclusion is that the broker is not entitled to the commission.⁵⁵

For the group of states that have no written requirement, the court must only ask whether the broker procured the closing.⁵⁶ The procuring cause question is further divided into majority and minority default rules.⁵⁷ The majority rule states that the broker must: (1) locate a buyer that is ready, willing, and able to buy on the terms fixed by the owner, and (2) ensure that the buyer enters into a binding contract with the owner to buy the property.⁵⁸ The minority default rule follows the same two rules above, but adds a third requirement: the contract must close title by the terms of the contract.⁵⁹

46. See *supra* note 17. Massachusetts and New York both require a written agreement, but the statutes expressly exclude licensed real estate brokers from such requirement. See MASS. GEN. LAWS ANN. ch. 259, § 7 (West 1992); N.Y. GEN. OBLIG. LAW § 5-701(a)(10) (Consol. 1977 & Supp. 2002).

47. See ROHAN ET AL., *supra* note 2, § 2.03[3], at 2-42 n.60.

48. *Id.* § 4.06[1], at 4-62.

49. *Id.*

50. *Id.*

51. *Id.*

52. See LEFCOE, *supra* note 20, at 52, 62-65.

53. See *id.* at 52.

54. See *id.* at 62-65.

55. Harry B. Lucas Co. v. Grand Dallas Warehouse, No. 3:01-CV-0938-M, 2002 WL 1489504, at *3 (N.D. Tex. July 9, 2002), *aff'd*, 2003 WL 342256. An action for the recovery of brokerage commission may not be brought unless the agreement is in writing and signed by the party to be charged. *Id.*

56. See Circle T Corp. v. Deerfield, 444 P.2d 404, 406 (Colo. 1968). Colorado does not require the agreement to be in writing in order for a broker to receive his commission. Rather the focus is on whether or not the broker found “a purchaser who is ready, willing, and able to complete the purchase of real estate.” COLO. REV. STAT. § 12-61-201 (2003).

57. See LEFCOE, *supra* note 20, at 63-64.

58. *Id.* at 63.

59. See *id.* at 63-64.

For those states that require a form of the Statute of Frauds to be met before the broker receives the commission, most will not allow for equitable recovery because to hold otherwise would be to nullify the statute.⁶⁰ The broker is presumed to know the law of the state and, therefore, cannot resort to the theory of quantum meruit or equitable estoppel if the broker fails to secure a written contract.⁶¹ The writing requirement may be satisfied by the written listing agreement, escrow instructions, or the purchase-and-sale agreement.⁶²

2. Purpose of Statute of Frauds in Regard to Real Estate Brokers' Commissions

Generally, the majority of states that have some form of Statute of Frauds do not allow recovery in quantum meruit because to do otherwise would be to nullify the statute completely.⁶³ The *Restatement of Contracts* states:

It is provided by statute that a real estate broker shall have no right to a commission for making a sale unless he has a contract or authority in writing from his principal. A broker who makes a sale for his principal without such written contract or authority cannot get judgment for the value of his services.⁶⁴

The Statute of Frauds requirement satisfies many purposes, among those being that it reinforces the importance of the transactional process between the seller and buyer, protects against brokers who may falsely claim commissions against a seller, and protects brokers against sellers who falsely deny what they owe.⁶⁵ The writing further helps parties avoid unwanted brokerage relationships.⁶⁶ There are some negative aspects to this requirement, and most likely for some of the following reasons, some states do not have this written contract requirement.⁶⁷ First, the formality of the requirement hinders participation of part-time brokers.⁶⁸ Second, this requirement greatly increases the amount of paperwork that will lead to disputes over the terms.⁶⁹ Third, most sellers do not hire their own attorneys to look over the contracts; therefore, brokers are able to construct the agreements in

60. C. C. Marvel, Annotation, *Real-Estate Broker's Right to Recover in Quantum Meruit for Services Although Contract is Not in Writing as Required by Statute*, 41 A.L.R.2d 905, 908 (1955).

61. LEFCOE, *supra* note 20, at 53.

62. *Id.*

63. See Marvel, *supra* note 60, at 908.

64. See *id.* at 907 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 355(3) illus. 7 (1932)).

65. LEFCOE, *supra* note 20, at 54.

66. Perry J. Woodward, Comment, *Intentional Interference with Prospective Economic Advantage: A Tort that Eviscerates the Real Estate Brokers' Statute of Frauds*, 36 SANTA CLARA L. REV. 1219, 1224-26 (1996).

67. LEFCOE, *supra* note 20, at 53.

68. *Id.*

69. *Id.*

their own favor.⁷⁰ Finally, the requirement is redundant and “contradicts trade practice in many commercial market segments where brokers rely on oral listings.”⁷¹

III. THE THREE VIEWS AMONG STATES REGARDING TREATMENT OF BROKERS SUING FOR COMMISSIONS

Among the states, three different views are found in regard to the treatment of brokers suing for commissions.⁷² These views include: (1) states that have some form of Statute of Frauds requirement; (2) states that do not require the brokerage agreement to be in writing in order for the broker to collect the brokerage commission; and (3) states that expressly exempt real estate brokers from the Statute of Frauds.⁷³

A. States that Have Some Form of Statute of Frauds Requirement⁷⁴

The first trend includes those states that require by statute (either through a special provision in the Statute of Frauds, through provisions in licensing statutes, or through administrative agencies) that the brokerage contract must be in writing in order for the broker to collect the commission.⁷⁵ It is in this category that some jurisdictions disregard the written contract requirement when determining whether the broker is entitled to a commission, and instead, only apply the rule that the broker find a ready, willing, and able buyer.⁷⁶

1. States with Special Provisions of the Statute of Frauds

In response to numerous claims for commissions, many state legislatures decided to include brokerage agreements in their Statute of Frauds requirement.⁷⁷ For example, California’s Statute of Frauds includes a provision requiring brokers to obtain a signed writing evidencing the commission agreement between the parties.⁷⁸ The theory behind requiring the additional brokerage agreement is to provide more security for the parties by giving them the ability to deny quan-

70. *Id.*

71. *Id.*

72. See discussion *infra* Parts III.A–C.

73. See discussion *infra* Parts III.A–C.

74. See LEFCOE, *supra* note 20, at 53 n.152.

75. See *id.*

76. “Able” means the buyer has “the necessary funds available to make the payments required and closing the deal within the specified time”; a “willing buyer is one who is willing to enter into a” binding contract; and a “ready” buyer is one who has been identified by name and intends to complete the transaction. EDMUND F. FICEK ET AL., REAL ESTATE PRINCIPLES AND PRACTICES 308–09 (6th ed. 1994).

77. See LEFCOE, *supra* note 20, at 52–53.

78. CAL. CIV. CODE § 1624(a)(3) (West 1985 & Supp. 2004).

tum meruit claims by the brokers.⁷⁹ States with special provisions presume that the brokers know the law.⁸⁰

2. States with Licensing Commission Regulations or Administrative Rules⁸¹

With licensing commission regulations, the problem arises where the written contract requirement is not a part of the Statute of Frauds, but rather falls under the licensing or administrative regulation set forth by the real estate commission of a jurisdiction.⁸² It is in these cases when the question arises as to whether the seller can use the written contract requirement "as a defense to a broker's suit for the commission."⁸³ Courts deciding these cases generally hold that the regulations adopted by the licensing commission have the full force and effect of law.⁸⁴ Because licensing and administrative regulations can be amended or revoked at any time by these agencies, it has been suggested that these states' legislatures should adopt the licensing regulations in order to maintain consistency, as well as to clear up any confusion as to whether or not the regulation is the law.⁸⁵

B. *States that Do Not Require the Brokerage Agreement to Be in Writing*

The second view includes states that have a general Statute of Frauds requirement but do not require a written contract in order for the broker to earn the brokerage commission, and instead, focus only on whether the broker produced a ready, willing, and able buyer.⁸⁶ The procuring cause doctrine has default rules that include both a majority and minority position as to its application.⁸⁷

The majority default rule holds that the brokerage payment becomes due at closing; however, the seller is liable for the commission even if the contract does not close through no fault of the seller.⁸⁸ This rule is favored by brokers because most of the work is completed by the time a willing buyer is found, and most importantly, it deters the seller and buyer from trying to cheat brokers out of their commissions.⁸⁹ The minority default rule does not allow brokers to recover

79. See LEFCOE, *supra* note 20, at 53.

80. *Id.*

81. *Id.* at 53 n.152.

82. GAUDIO, *supra* note 8, at 156.

83. *Id.*

84. See *Green Mountain Realty, Inc. v. Fish*, 336 A.2d 187, 189 (Vt. 1975); see also ROHAN ET AL., *supra* note 2, § 4.05[1], at 4-43.

85. GAUDIO, *supra* note 8, at 159.

86. See ROHAN ET AL., *supra* note 2, § 2.03[3], at 2-42.

87. See LEFCOE, *supra* note 20, at 62-64.

88. *Id.* at 62. Many times, if the contract fails through no fault of the seller, the broker will not demand payment in order to maintain good relationships. *Id.*

89. *Id.* at 63.

their commissions when the deal fails.⁹⁰ Here, the commission is earned when the ready, willing, and able buyer enters into a binding contract, and the transaction is completed by closing the title to the property.⁹¹ In some states, the broker is entitled to contract around the two default rules.⁹²

Although these states have not included brokerage agreements in the traditional Statute of Frauds requirement, the statute may still apply.⁹³ For instance, if the broker receives some interest in the land as part of the commission owed to him or the employment contract between the broker and the owner may not be completed within a year, then the situation would fall directly under the traditional Statute of Frauds writing requirement and, therefore, a traditional Statute of Frauds defense could be utilized.⁹⁴

C. *States with Statute of Frauds Excluding Real Estate Brokers from the Writing Requirement*

The third view includes states in which the respective pertinent statute expressly states that the licensed real estate broker or salesperson does not fall under the Statute of Frauds.⁹⁵ In these states, it is assumed that licensed professionals have more knowledge and experience than others who just act as brokers; therefore, the licensed brokers are exempt.⁹⁶ The New York Appellate Division reasoned that excluding licensed real estate brokers from the brokerage Statute of Frauds did not violate the Equal Protection Clause of the United States Constitution or the New York Constitution because the state had a rational basis in holding the licensed professionals to a higher degree of knowledge and skill.⁹⁷ Furthermore, the purpose of New York's statute in limiting who the written requirement is applied to is to protect against fraud and mistake; both of which, it is assumed, a licensed professional will be aware of and not allow to occur.⁹⁸

New York's Statute of Frauds requirement excluding licensed brokers, however, is the exception to those states that do require licensed real estate brokers to obtain a written commission statement for the purpose of protecting real estate owners against unfounded claims

90. *Id.*

91. *Id.* at 64.

92. *Id.* at 64-65.

93. See ROHAN ET AL., *supra* note 2, § 2.03[3], at 2-47.

94. *Id.*

95. See MASS. GEN. LAWS ANN. ch. 259, § 7 (requiring brokerage agreements to be in writing but exempting licensed brokers and salespersons from its requirements); N.Y. GEN. OBLIG. LAW § 5-701(a)(10) (Consol. 1977 & Supp. 2002) (requiring brokerage agreements to be in writing, but exempting licensed brokers and salespersons from its requirements).

96. See GAUDIO, *supra* note 8, at 155-56.

97. *Traver v. Betts*, 442 N.Y.S.2d 195, 197 (N.Y. App. Div. 1981).

98. See *Shaftel v. Dadras*, 39 F. Supp. 2d 217, 228 (E.D. N.Y. 1999).

made by licensed real estate brokers.⁹⁹ When a licensed broker is hired, the client expects a trained and knowledgeable professional.¹⁰⁰ To ensure the seller's protection, a majority of the states require the broker to obtain a written agreement, and if the licensed broker chooses not to, then they should expect no assistance from the law.¹⁰¹ New York's exclusion of the licensed professional puts forth great faith in such brokers where approximately twenty-five other states do not.¹⁰²

IV. ILLUSTRATION OF THE FESTERING MINORITY—COURTS THAT APPLY THE COMMON-LAW RULE OF EQUITY IN SPITE OF THE STATUTE OF FRAUDS

Even though the states that fall under this category require some written agreement, some courts are refusing to apply the writing requirement or are finding ways around the rule.¹⁰³ A good illustration of state courts misapplying the law is the *Frady v. May*¹⁰⁴ case from the Fort Worth Court of Appeals in Texas.¹⁰⁵ Following the discussion of *Frady v. May*, there will be an overview of the other jurisdictions that are ignoring the Statute of Frauds to show that this is a problem, and if not dealt with, fraudulent behavior will continue despite the attempts of the legislatures to protect the parties.¹⁰⁶

A. Example: Texas in *Frady v. May*

Bart May sued E.N. Frady and Marsha Frady in order to receive his brokerage commission on the sale of a farm after the Fradys had allegedly released the buyer from an earlier contract negotiated by May and then closed under a new contract on similar terms, but without the inclusion of the brokerage commission agreement.¹⁰⁷ May and the Fradys initially signed a listing agreement in which the Fradys agreed to pay May a six percent commission on the sale of the farm.¹⁰⁸ Because May was unable to find a buyer by the termination date of the agreement, it expired.¹⁰⁹ May and the Fradys then orally agreed to continue the relationship.¹¹⁰ Nichols, the buyer, contacted May and

99. Patrick J. Rohan, *Title Insurance, Deeds, Binders, Brokers and Beyond*, N.Y. ST. B.J., Oct. 2000, at 49, 53; see 12 C.J.S. *Brokers* § 122 (1980 & Supp. 2003).

100. MALLOY & SMITH, *supra* note 4, at 55.

101. See LEFCOE, *supra* note 20, at 53.

102. See *id.* at 52.

103. See, e.g., *Frady v. May*, 23 S.W.3d 558 (Tex. App.—Fort Worth 2000, pet. denied).

104. 23 S.W.3d 558 (Tex. App.—Fort Worth 2000, pet. denied).

105. See *id.*

106. See discussion *infra* Part IV.B.

107. *Frady*, 23 S.W.3d at 560.

108. *Id.* at 561.

109. *Id.*

110. *Id.*

agreed to buy the property.¹¹¹ The parties negotiated a contract that contained a closing provision stating if the closing did not occur by August 1, the non-defaulting party was entitled to terminate the contract.¹¹² The contract contained a commission agreement that stated May was entitled to his commission on the closing of the sale, on termination of the contract—except as permitted by its terms or if the closing was prevented by the seller.¹¹³ The contract also contained a financing paragraph that gave the buyer thirty days to acquire financing, and if he was unable to do so, then the contract was to be terminated.¹¹⁴

Nichols was unable to close within the allotted amount of time.¹¹⁵ May did not prepare a written extension of the contract.¹¹⁶ On September 15, Nichols signed a second contract with the Fradys, without notice to May.¹¹⁷ The second contract did not include a commission provision for May.¹¹⁸ Shortly after the second contract closed, May filed suit against the parties to recover his commission, arguing that Nichols and the Fradys intentionally failed to notify him of the second contract in order to avoid paying May his commission for bringing the parties together under the original contract.¹¹⁹ The trial court held that the commission was not contingent upon the sale closing under a specific contract and, therefore, because May was the procuring cause of the final sale and the buyer found was ready, willing, and able to buy, May was entitled to his commissions.¹²⁰ The Fort Worth Court of Appeals affirmed the trial court's judgment.¹²¹

1. Analysis

The Court of Appeals correctly cited to the Texas Real Estate Licensing Act (hereinafter TRELTA) by stating that a broker will not earn the commission if the broker does not comply with the requirements of the Act.¹²² Section 1101.806(c) states:

A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document.¹²³

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 561–62.

120. *Id.* at 562.

121. *Id.* at 566.

122. *Id.* at 562.

123. TEX. OCC. CODE ANN. § 1101.806(c) (Vernon 2003).

The court then discussed the *Goodwin v. Gunter*¹²⁴ case, in which the Texas Supreme Court established that a broker is entitled to the commission when he procures a buyer.¹²⁵ The court continued by looking at past Texas cases that have rejected the argument that "a broker's right to a commission hinges on his actual negotiation or continued employment through the time of the final consummation of the sale."¹²⁶ The fact that the broker's commission is not contingent upon his actual negotiation or continued employment is simply a description of an exclusive right to sale agreement where the broker's commission does not rest on his finding the eventual buyer.¹²⁷ The court was correct in its characterization of the type of agreement that was established in this case, but the type of agreement does not mean that the initial inquiry of whether or not there was a written agreement is no longer applicable.¹²⁸

The court erred in *Frady* because it relied primarily on common law that supports the procuring cause doctrine without also relying on the TRELTA.¹²⁹ By relying only on common law, the Court of Appeals missed the point that the Act purposely sets forth.¹³⁰ In allowing the first contract that expired to carry over the commission provision to the final agreement, the court essentially ignored the TRELTA in order to accommodate the broker.¹³¹ While equity is an important principle to apply in many cases, it should not have been applied in *Frady*, or in other cases where the statute specifically states that a broker does not earn a commission without a written contract because the statute explicitly states that no commission can be earned without a written brokerage commission agreement.¹³²

All fifty states have some form of licensing commission that oversees real estate brokers.¹³³ Upon hiring a broker, the relationship between the client and broker is governed by contract law and agency law.¹³⁴ Because brokers are considered fiduciaries, they have professional duties to the client that they must meet.¹³⁵ As professionals, brokers should be held to higher standards than the seller and buyer involved in the real estate transaction because the broker is consid-

124. 109 Tex. 56, 185 S.W. 295 (1916).

125. *Frady*, 23 S.W.3d at 562.

126. *Id.* at 563.

127. See LEFCOE, *supra* note 20, at 58.

128. See TEX. OCC. CODE ANN. § 1101.806(c).

129. See *Frady*, 23 S.W.3d at 564-65 (stating that the commission agreement was not conditional upon the sale closing under the first contract that had expired).

130. See *Denman v. Hall*, 144 Tex. 633, 636, 193 S.W.2d 515, 516 (1946) (stating that "[t]he effect of this statute is to require that contracts by which an agent is employed to buy or sell real estate must be in writing").

131. See *Frady*, 23 S.W.3d at 565.

132. See TEX. OCC. CODE ANN. § 1101.806(c).

133. MALLOY & SMITH, *supra* note 4, at 52.

134. *Id.* at 54.

135. *Id.* at 55.

ered a fiduciary.¹³⁶ The broker, as a fiduciary, is expected to “perform competently . . . [and] to observe high ethical standards of behavior.”¹³⁷ In *Frady*, the broker could have easily requested the extension to be in writing before he continued working further for the seller.¹³⁸ Despite the broker’s failure to follow the licensing requirements, the court still granted his commission.¹³⁹ It is true that the Fort Worth Court of Appeals is in the minority, but this minority stretches across the nation and it seems to be holding strong.¹⁴⁰

An argument could be made that the statute allows for quantum meruit to be applied in certain cases in order to protect the broker. The Texas Supreme Court, however, has ruled that the TRELA is to be strictly followed.¹⁴¹ To allow brokers their commissions when written agreements do not exist would be to eviscerate the brokerage statute.¹⁴² Moreover, the court that decided *Frady v. May* is among the minority of jurisdictions that allow for exceptions to the writing requirement.¹⁴³

2. Comparison of Other Texas Courts’ Treatment of Statute of Frauds in Relation to *Frady*

The Texas Supreme Court has consistently held that the brokerage statute is to be complied with if brokers are to earn their commissions.¹⁴⁴ For example, in *Texas Builders v. Keller*, the Texas Supreme Court held that brokers will not be entitled to brokerage commissions unless they comply with the TRELA, Section 1101.806(c).¹⁴⁵ The purpose of the TRELA “is to prevent fraud arising from parol testimony.”¹⁴⁶ Also, the United States District Court for the Northern District of Texas held that the TRELA is to be strictly construed and that there is no room for an equitable exception.¹⁴⁷

The appellate courts in Texas have also consistently held that brokers are not entitled to commissions without written agreements. In

136. *See id.* at 54–55.

137. *See id.* at 55.

138. *See Frady v. May*, 23 S.W.3d 558, 561 (Tex. App.—Fort Worth 2000, pet. denied).

139. *See id.* at 566.

140. *See* discussion *infra* Part IV.B.

141. *See Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 635 (Tex. 1997). The court notes that the legislature was clear: “[A] broker may not recover a commission unless the commission agreement is in writing.” *Id.*

142. *See id.*

143. *See* discussion *infra* Part IV.B.

144. *See Tex. Builders v. Keller*, 928 S.W.2d 479, 480 (Tex. 1996) (holding that real estate brokers may not circumvent requirements of the Real Estate Licensing Act); *see also Denman v. Hall*, 144 Tex. 633, 636, 193 S.W.2d 515, 516 (1946) (noting that real estate agreements are unenforceable unless they are in writing).

145. *See Tex. Builders*, 928 S.W.2d at 481.

146. *Denman*, 144 Tex. at 636, 193 S.W.2d at 516.

147. *Harry B. Lucas Co. v. Grand Dallas Warehouse*, No. 3:01-CV-0938-M, 2002 WL 1489504, at *5–6 (N.D. Tex. July 9, 2002), *aff’d*, 2003 WL 342256.

1970, the Houston Court of Civil Appeals acknowledged that the TRELTA must be strictly complied with in order for the broker to earn the brokerage commission.¹⁴⁸ In 1987, the Dallas Court of Appeals reiterated its previous holding "that in the absence of a written agreement complying with Texas Revised Civil Statutes Annotated, article 6573a, a real estate claim for commission is unenforceable even if the broker was the procuring cause of the sale."¹⁴⁹ Other appellate courts have also held that without a written agreement the broker is not entitled to a brokerage commission.¹⁵⁰

If the Texas Supreme Court, the Fifth Circuit Court of Appeals applying Texas law, as well as many courts of appeals across Texas hold that brokers cannot earn a brokerage commission unless the TRELTA is complied with, then how did the Fort Worth Court of Appeals make its decision?¹⁵¹ The court went against mandatory case precedent, as well as against the majority trend among the Texas appellate courts.¹⁵² Because the Licensing Act has been adopted as law, then it must be a part of a court's analysis regarding the earnings of brokerage commissions.¹⁵³ The Fort Worth Court of Appeals is not alone in its misapplication of the law regarding the collection of brokerage commissions.

B. Survey

Out of the twenty-six states that have some form of Statute of Frauds requirement, five states,¹⁵⁴ including Texas, are home to a minority of courts that find ways around the writing requirement in order to hold in favor of the broker.¹⁵⁵ Some courts have done so by reclassifying the broker and seller relationship, allowing for the doctrine of estoppel, or by ignoring the Statute of Frauds requirement in

148. *Stafford v. Smith*, 458 S.W.2d 217, 220 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

149. *Campagna v. Lisotta*, 730 S.W.2d 382, 384–85 (Tex. App.—Dallas 1987, no writ) (citing *Sherman v. Bruton*, 497 S.W.2d 316, 321 (Tex. Civ. App.—Dallas 1983, no writ)).

150. *Brice v. Eastin*, 691 S.W.2d 54, 57 (Tex. App.—San Antonio 1985, no writ); *Mills v. PMP Mobile Home & Trailer Park*, 630 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1982, no writ); *Bayer v. McDade*, 610 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Taylor v. Neal*, 467 S.W.2d 197, 198 (Tex. Civ. App.—Amarillo 1971, writ dismissed).

151. See *Fraday v. May*, 23 S.W.3d 558 (Tex. App.—Fort Worth 2000, pet. denied).

152. See *id.*; see also *Tex. Builders v. Keller*, 928 S.W.2d 479, 480 (Tex. 1996) (holding that real estate brokers may not circumvent requirements of the Real Estate Licensing Act); *Denman v. Hall*, 144 Tex. 633, 636, 193 S.W.2d 515, 516 (Tex. 1946) (noting that real estate agreements for commission are unenforceable unless they are in writing).

153. See *Denman*, 144 Tex. at 636, 193 S.W.2d at 516.

154. See discussion *infra* Part IV.B.

155. See *Ellingson v. Sloan*, 527 P.2d 1100, 1105 (Ariz. Ct. App. 1974); *Tenzer v. Superscope, Inc.*, 702 P.2d 212, 217–18 (Cal. 1985); *Hamilton v. Funk*, 666 P.2d 582, 583 (Haw. 1983); *Peacock Realty Co. v. E. Thomas Crandall Farm, Inc.*, 278 A.2d 405, 410 (R.I. 1971); *Fraday v. May*, 23 S.W.3d 558, 564–66 (Tex. App.—Fort Worth 2000, pet. denied).

favor of the procuring cause doctrine. Surveying the states, it is apparent that some jurisdictions are ignoring the Statute of Frauds requirement as it applies to the treatment of brokers and their rights to commissions. The sections that follow include a discussion of the different methods courts have used to sidestep particular states' Statute of Frauds requirements.

1. Arizona

In Arizona, for a broker to receive a commission, the agreement authorizing employment to purchase or sell the property must be in writing.¹⁵⁶ The case law in Arizona is clear; the Statute of Frauds must be followed and real estate brokers are assumed to understand the law as it applies to their profession.¹⁵⁷ According to one court of appeals in Arizona, however, if the relationship between broker and seller can be reclassified, then the Statute of Frauds does not have to be applied.¹⁵⁸

In *Ellingson v. Sloan*,¹⁵⁹ the sellers entered a contract with a building contractor to develop the property in a joint venture.¹⁶⁰ Sloan, a real estate broker, was brought in by the sellers and the contractor to help with the financing.¹⁶¹ When the agreement with the developer fell through, the sellers made an oral agreement with Sloan to join them in the joint venture.¹⁶² The sellers were faced with great financial difficulty and eventually decided to sell off the property rather than develop it, and both parties agreed to abandon the venture.¹⁶³ Because Sloan was a broker, the parties agreed orally that he would sell the property with the understanding that he would receive compensation for his part in the dealings.¹⁶⁴ A sale was negotiated, but Sloan never received the compensation to which the parties had orally agreed.¹⁶⁵ The trial court held for Sloan based on the joint venture relationship, and the sellers' argument that the oral agreement was unenforceable based on Statute of Frauds was rejected.¹⁶⁶ The court of appeals affirmed.¹⁶⁷

While the initial agreement most likely fell under a joint venture agreement, the parties all agreed to abandon the project and sell the

156. ARIZ. REV. STAT. ANN. § 44-101 (West 2003).

157. See *McMurrin v. Duncan*, 155 P. 306, 308 (Ariz. 1916); *Olson v. Neale*, 570 P.2d 209, 211 (Ariz. Ct. App. 1977).

158. See *Ellingson*, 527 P.2d at 1105.

159. 527 P.2d 1100 (Ariz. Ct. App. 1974).

160. *Id.* at 1102.

161. *Id.*

162. *Id.*

163. *Id.* at 1103.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1105.

property.¹⁶⁸ At that point, the court determined that the joint venture did not end just because the sale of the property was a different project than originally agreed upon between the parties.¹⁶⁹ The fact that the parties initially had a joint venture agreement made it easy for the court to stretch the initial agreement into the second agreement to sell the property with the assistance of a broker.¹⁷⁰ Because Sloan was acting under his broker capacity, the Arizona Statute of Frauds should have been complied with in order for him to fairly receive his commission.¹⁷¹ Moreover, under Arizona law, a real estate broker is presumed to know the law.¹⁷² Therefore, to cover all of his bases, Sloan should have asked for the agreement to be in writing because he was a real estate broker.¹⁷³ The oral agreement to sell the property evidenced Sloan's disregard for the law.¹⁷⁴ By allowing Sloan to recover under a joint venture law after the venture was abandoned, the court of appeals disregarded the Statute of Frauds requirement.¹⁷⁵

2. California

California's Statute of Frauds states that "[a]n agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate . . . for compensation or a commission" is invalid unless there is a written agreement signed by the party to be charged.¹⁷⁶

In *Tenzer v. Superscope, Inc.*,¹⁷⁷ the California Supreme Court ruled that an unlicensed real estate finder could be entitled to the brokerage commission under the doctrine of estoppel.¹⁷⁸ Superscope was a corporation suffering financial difficulties.¹⁷⁹ The president of the corporation, Tushinsky, invited Tenzer to join the board.¹⁸⁰ Once a member, Tenzer learned of the corporation's financial difficulties, as well as a plan to sell the headquarters to pay off the banks.¹⁸¹ Tenzer subsequently came into contact with an interested buyer who agreed to buy.¹⁸² Tenzer then contacted Tushinsky and asked for a finder's fee.¹⁸³ Tushinsky assured Tenzer that he would be entitled to such a

168. *Id.* at 1103.

169. *Id.* at 1104.

170. *See id.* at 1104-05.

171. *See* ARIZ. REV. STAT. ANN. § 44-101 (West 2003).

172. *See* Olson v. Neale, 570 P.2d 209, 211 (Ariz. Ct. App. 1977).

173. *See* ARIZ. REV. STAT. ANN. § 44-101 (West 2003).

174. *See Ellingson*, 527 P.2d at 1103.

175. *See id.* at 1103-05.

176. CAL. CIV. CODE § 1624(a)(4) (West 1985 & Supp. 2004).

177. 702 P.2d 212 (Cal. 1985).

178. *See id.* at 221.

179. *Id.* at 213.

180. *Id.*

181. *Id.*

182. *Id.* at 214.

183. *Id.*

fee.¹⁸⁴ The closing took place, and eventually the Board voted not to allow the payment of a finder's fee.¹⁸⁵ Tenzer sued both Tushinsky and the corporation, alleging breach of contract, unjust enrichment, estoppel, and fraud.¹⁸⁶ Tushinsky and Superscope were granted summary judgment, and Tenzer appealed to the California Supreme Court.¹⁸⁷

Among Tenzer's three contentions, he suggested that because he was an unlicensed finder, he was entitled to bring a claim for estoppel.¹⁸⁸ Estoppel may be applied to rectify situations where a party will suffer due to the other party's unjust enrichment.¹⁸⁹ The court noted that the Statute of Frauds as applied to real estate brokers has faced harsh criticism because licensed brokers are unable to argue estoppel as a defense.¹⁹⁰

The court differentiated between licensed and unlicensed brokers, concluding that, because licensed brokers must demonstrate an understanding of the law, the law should hold them to a higher standard than it holds unlicensed brokers.¹⁹¹ The court compared real estate finders to unlicensed brokers and stated that finders cannot be held to the same standard as those who are licensed and presumed to know the law.¹⁹² While the court noted that section 1624 does not include a finder's exception,¹⁹³ meaning even a finder must reduce the commission agreement to writing,¹⁹⁴ Tenzer was still entitled to estoppel despite section 1624 because the court found unjust enrichment.¹⁹⁵ However, section 1624(a)(4) clearly states that in order for a broker or "any other person" to receive compensation or a commission, the agreement must be in writing.¹⁹⁶ The court in this case made the point that the legislature amended the statute twice in response to the interpretations handed down from the courts.¹⁹⁷ In 1967, the California Legislature amended the statute to include the words "any other person" to deal with courts interpreting the statute to bar only oral finder's agreements between licensed brokers and sellers.¹⁹⁸ The court acknowledged the Statute of Frauds requirement and the fact that there was no finder's exception but still awarded a commission to

184. *Id.*

185. *Id.* at 214–15.

186. *Id.* at 215.

187. *See id.*

188. *See id.* at 215–16.

189. *See id.* at 216.

190. *Id.* at 217 n.6.

191. *See id.* at 217–18.

192. *Id.* at 217–18.

193. *Id.* at 216.

194. *See id.*

195. *Id.* at 217–18.

196. CAL. CIV. CODE § 1624(a)(4) (West 1985 & Supp. 2004).

197. *See Tenzer*, 702 P.2d at 216.

198. *Id.*

Tenzer.¹⁹⁹ It is clear that no commission should be granted to a broker or "any other person" absent an agreement in writing.²⁰⁰ Even if the statute may have harsh effects, it is still the law and should be complied with if it is to have any force and effect at all.

3. Hawaii

Section 656-1 of the Hawaii Revised Statutes states that "[n]o action shall be brought and maintained [in a case] . . . [t]o charge any person upon any agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission."²⁰¹

In *Hamilton v. Funk*,²⁰² the Hawaii Supreme Court held that the broker was entitled to a commission, even though the broker had blatantly disregarded the statute because the agreement under which the broker agreed to find a buyer was not in writing.²⁰³ Again, the statute clearly states that no action shall be brought in cases of real estate commission unless the agreement is in writing.²⁰⁴ The agreement was not in writing, yet the broker brought the buyer and seller together and expected to earn a commission.²⁰⁵ The court reasoned that there are some cases "where injustice can be avoided only by enforcement of the promise."²⁰⁶ This case is a clear example of a court applying equity principles instead of following the state statute. As argued earlier, equity should be applied in certain instances, but when a professional licensed broker who is charged with knowing the law fails to follow it, equity should not be the court's choice. One may wonder why the Hawaii courts refuse to follow a special provision of the Statute of Frauds enacted by the Hawaii Legislature.

4. Rhode Island

The Statute of Frauds in Rhode Island requires that any agreement to pay a commission for the sale of real estate must be in writing and signed by the party to be charged.²⁰⁷ In 1967, the Supreme Court of Rhode Island expressly stated that a real estate broker is not entitled to a commission absent a written agreement.²⁰⁸ The court also held that allowing estoppel to be used as a defense to the Statute of Frauds when real estate brokerage agreements are in question would invali-

199. *See id.* at 216-18.

200. CAL. CIV. CODE § 1624(a)(4).

201. HAW. REV. STAT. § 656-1 (2002).

202. 666 P.2d 582 (Haw. 1983).

203. *See id.* at 583.

204. *See* HAW. REV. STAT. § 656-1 (2002).

205. *Hamilton*, 666 P.2d at 583.

206. *Id.*

207. R.I. GEN. LAWS § 9-1-4 (1997).

208. *Heyman v. Adeack Realty Co.*, 228 A.2d 578, 581 (R.I. 1967).

date the very purpose of the statute itself, namely, to protect against unfounded claims.²⁰⁹

In a cause of action for recovery of commissions under brokerage agreements based on an oral promise, the Rhode Island Supreme Court found in favor of the broker, thereby affirming the lower court's judgment.²¹⁰ The broker had orally agreed with the seller to act as the broker in return for a ten percent commission for his work in finding a buyer for defendant's farmland.²¹¹ The broker was able to locate a buyer, leading to the written agreement between the defendant and the buyer.²¹² Because the seller did not pay the broker commission, a trial ensued.²¹³

The court decided to focus on the issue of whether the "buy and sell agreement between [the parties] . . . and signed by both [would] suffice as a note or memorandum of the defendant's oral agreement to pay plaintiff a commission upon the sale."²¹⁴ The sales agreement made no mention of the commission statement, resulting in a case of first impression for the court.²¹⁵ Authorities note that a writing will be found "inadequate if it fails to state the amount of the compensation or the commission to be paid to the agent or broker."²¹⁶ Instead of looking to the available authorities and to the statute itself, the court relied mainly on principles of equity.²¹⁷ Even though an employee of the defendant admitted on the stand that there was such an oral agreement, the statute clearly states that all such agreements must be in writing.²¹⁸ The broker, who was a professional broker of farmland, should have been held to the same standard as all other brokers who are presumed to know the law.²¹⁹

The court relied on case law from other states that allowed admissions, in the form of testimony, to satisfy the written memorandum requirement.²²⁰ The Statute of Frauds can have harsh effects, but that alone should not keep courts from upholding the law. Again, the purpose of the Statute of Frauds is to protect all of the parties from unscrupulous actors.²²¹ Moreover, Rhode Island, along with the other states, established licensing regulations for further protection.²²² The

209. *Id.* at 580.

210. *Peacock Realty Co. v. E. Thomas Crandall Farm, Inc.*, 278 A.2d 405, 405, 410 (R.I. 1971).

211. *Id.* at 406.

212. *Id.*

213. *Id.*

214. *Id.* at 407.

215. *Id.*

216. *Id.* at 408.

217. *See id.* at 408, 410.

218. *Id.* at 408.

219. *See LEFCOE, supra* note 20, at 53.

220. *Peacock Realty Co.*, 278 A.2d at 409.

221. *MALLOY & SMITH, supra* note 4, at 146.

222. *See LEFCOE, supra* note 20, at 53 n.152.

parties involved in the transaction are put at risk of falling prey to fraud every time a court uses its discretion to ignore the regulations set forth by the state.²²³ If a person is in the business of selling real estate, that person should have to conform to the law. If the broker fails to meet the requirements, he does so at his own risk.²²⁴

V. PROPOSAL

State legislatures have made special provisions in their Statutes of Frauds in regards to real estate brokers receiving commissions in order to prevent fraudulent claims by either party.²²⁵ Among these states, some jurisdictions have chosen to apply equity principles rather than the statute in order to compensate the broker because most often the broker did procure a ready, willing, and able buyer.²²⁶ Even though it may seem fair to apply equitable principles at times, the law clearly states that a written contract or memorandum is required.²²⁷ If that prerequisite is not satisfied, then the courts should not even go to the next step as dictated by their state legislatures.²²⁸ By ignoring the statutes as set forth by their respective state legislatures, these states act to nullify the legislative purposes of protecting the owners of real estate.²²⁹

Among the three views,²³⁰ the best choice, in order to prevent fraudulent claims made by brokers as well as sellers, is to follow the states that have some form of Statute of Frauds requirement that expressly excludes recovery by quantum meruit. The various state courts that overlook the Statute of Frauds requirement for fairness reasons should not be allowed to do so. States that have some form of Statute of Frauds should further amend their statutes to include language stating that quantum meruit or equitable estoppel shall not be applied in real estate commission situations. Such a statute might contain the following:

An action may not be brought in a court in this state for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by the party to sign it,²³¹ and recovery under the theory of quantum meruit shall not be allowed where there is no such writing.

223. *Id.* at 53.

224. *Id.*

225. *Id.* at 52-53.

226. *See supra* text accompanying notes 153-208.

227. *See supra* text accompanying notes 153-208.

228. *See supra* text accompanying notes 47-65.

229. *See Marvel, supra* note 61, at 907 n.10.

230. *See supra* text accompanying notes 75-103.

231. Some wording taken from the current Texas statute. *See* TEX. OCC. CODE ANN. § 1101.806(c) (Vernon 2003).

Such reinforcement of the Statute of Frauds requirements would put all professional real estate brokers on notice that they are risking their commissions if they do not strictly adhere to their states' regulations. By reinforcing the brokerage Statute of Frauds, all the parties involved should receive better protection. Furthermore, such bright-line rules also serve the purpose of preserving judicial efficiency.

In *Roseberry v. Heckler*,²³² the broker did, in fact, procure a ready, willing, and able buyer, but the commission statement was made orally between the broker and the seller.²³³ The Arizona Supreme Court held that "there is no particular hardship in requiring the broker to secure from the owner his signature to something written specifying the exact terms which he has indicated as acceptable."²³⁴ It has also been stated that brokers who choose to ignore the law and fail to obtain a written commission agreement "can expect no assistance from the courts in their effort to extricate themselves from their own folly."²³⁵

VI. CONCLUSION

The purpose of the Statute of Frauds is to protect real estate owners against the possibility of unfounded claims made by unscrupulous brokers. This purpose will not be satisfied if the brokerage statute is allowed to be sidestepped when brokers choose not to follow the law. While the law may be harsh, in this instance it is better to have a bright-line rule that is to be followed in order to protect the parties and preserve judicial efficiency.

Stephanie Councilman

232. 326 P.2d 365 (Ariz. 1958).

233. *Id.* at 365-66.

234. *Id.* at 366.

235. LEFCOE, *supra* note 20, at 53.