1-1-1996

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INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE: A TORT THAT EVISCERATES THE REAL ESTATE BROKERS' STATUTE OF FRAUDS

I. INTRODUCTION

More than a century ago, the California Legislature enacted the real estate brokers' statute of frauds. Today codified as Civil Code section 1624, subdivision (d), this act explicitly renders any unwritten agreement employing a broker to purchase or sell lands for compensation invalid. The California Supreme Court, in 1987, characterized section 1624(d) as perhaps the state's first "consumer protection statute." Beyond the certainty typically afforded by statute of frauds legislation, the state supreme court has identified two further aims which are promoted by signed writings in the real estate brokerage setting. Written brokerage agreements shield sellers and buyers from: (1) the imposition of unwanted brokerage relationships and resultant liability for commissions; and (2) the unfounded and multiple claims especially prevalent in the real estate service sector.

As licensees who have met educational and examination requirements, brokers are conclusively presumed to be aware of and to understand section 1624(d). Despite this knowledge, many brokers routinely ignore the law by relying upon

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   The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
   
   . . . .
   (d) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate . . . for compensation or a commission.

   Id.
3. Phillipe, 743 P.2d at 1289.
4. Id. at 1289-90.
5. See infra part II.A.1.
7. Phillipe, 743 P.2d at 1286.
unwritten fee agreements. Faced with this frustrating reality, the high court today evidences little sympathy for brokers who refuse to obtain their brokerage contracts in writing.

This stern attitude reflects a growing reluctance on the part of California courts to award compensatory damages to brokers who ignore their legal duties. Moreover, strict application of the real estate brokers' statute of frauds effectuates the legislature's recently heightened desire to protect consumers by insisting upon documented transactions, and specifically safeguards those requiring real estate brokerage services.

These judicial and legislative trends are at odds, however, with the California Supreme Court's 1975 decision of Buckaloo v. Johnson. There, a broker sought to recover a commission purportedly earned under an unwritten seller/broker contract. Although the statute of frauds sheltered the seller, the broker circumvented the need for a signed writing by claiming the buyer had interfered with his expectancy of compensation. The supreme court agreed, ruling that an unwritten commission agreement — despite its unenforceable nature — will sustain a broker's action based upon intentional interference with prospective economic advantage.

8. See infra part II.A.3.
11. Phillippe, 743 P.2d at 1289-90 (listing consumer contracts now required to be in writing to demonstrate this "clear legislative purpose").
12. See, e.g., CAL. BUS. & PROF. CODE § 10176(f) (West 1994) (mandating that definite termination date be specified in all exclusive listings for which a real estate license is required) (enacted 1945); CAL. BUS. & PROF. CODE § 10147.5 (West 1994) (establishing negotiability and notice requirements for real estate commission contracts) (enacted 1979); CAL. CIV. CODE § 2079.14 (West Supp. 1996) (imposing duty on brokers in residential transactions to provide parties with written agency disclosure) (enacted 1986).
15. Id. at 872.
16. Id. at 873.
In Della Penna v. Toyota Motor Sales, USA, Inc.,17 decided on October 12, 1995, the California Supreme Court overruled Buckaloo v. Johnson.18 The Buckaloo decision, authored by Justice Mosk for a unanimous supreme court in 1975, had stood for twenty years.19 To the extent that the Buckaloo holding permitted a plaintiff to recover without showing any hint of wrongful conduct on the part of the defendant, however, it was disapproved.20 After Della Penna, a plaintiff must show wrongful conduct as an element of the tort.21

The Della Penna majority, however, reserved consideration of the type of wrongful conduct required for another day.22 Whether a plaintiff will be required to prove, for example, "that the defendant's conduct amounted to an independently tortious act, or was a species of anticompetitive behavior proscribed by positive law, or was motivated by unalloyed malice,"23 remains unknown.

This comment, like the Della Penna decision, is highly critical of the Buckaloo decision's creation of liability absent wrongful conduct by the defendant, specifically in the real estate brokerage context.24 This is the factual setting for the Buckaloo opinion, while Della Penna concerned an automobile wholesaler-plaintiff and an auto manufacturer-defendant.25 Long-standing statutory authority requires all real estate brokerage contracts to be in writing and signed by the party to be charged.26 The permissive cause of action fashioned in Buckaloo undermined the sound policy considerations promoted by requiring real estate brokers to obtain signed writings.27

As explained in part II, the Buckaloo facts should have led to an explicit exploration of two conflicting doctrines.28

17. 902 P.2d 740 (Cal. 1995).
18. Della Penna, 902 P.2d at 751 n.5.
19. Id. at 748-49.
20. Id. at 751 n.5.
21. Id.
22. Id. at 741.
23. Della Penna, 902 P.2d at 741.
24. See discussion infra part IV.
25. Della Penna, 902 P.2d at 742-43.
27. See discussion infra part IV.
28. Seeinfra part II.C.4. See generally Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract
One doctrine — embodied in the real estate brokers’ statute of frauds — protects the public by insisting on signed brokerage contracts. The countervailing doctrine — embodied in the tort of intentional interference with prospective economic advantage — protects brokers who suffer the loss of an advantageous relationship due to the acts of a malicious interloper. Remarkably, however, the Buckaloo court focused exclusively upon the broker’s harm and ignored the policy considerations supporting the real estate brokers’ statute of frauds.

Twenty years later, hindsight reveals that the Buckaloo court’s indifference toward section 1624(d) stemmed from the grave uncertainty that engulfed that statute in 1975. The gradual development of the equitable estoppel doctrine as a bar against certain statute of frauds defenses created serious questions about the vitality of the century-old statute. These very questions were the subject of vociferous academic debate at the time of the Buckaloo decision, and remained unanswered by the supreme court until the Phillippe v. Shapell Industries decision more than a decade later.

Ultimately, in Phillippe, the supreme court unequivocally rejected equitable estoppel as a means of circumventing the real estate brokers’ statute of frauds. Instead, the high court propounded the statute’s “sound policy considerations” for the first time. With the salutary aims of section 1624(d) in mind, part III highlights the need for a post-Phillippe analysis of the Buckaloo holding.

*Doctrine*, 49 U. CHI. L. REV. 61, 123-24 (1982) (highlighting the need for courts to craft rules that both prevent fraudulent claims by brokers and prevent transacting parties from unjustly appropriating brokers’ efforts).

31. *See id.* at 868-73.
32. *See infra* part IV.B.
33. *See infra* part II.B.2. At the time, highly respected commentators were calling upon the California Supreme Court to judicially abrogate § 1624(d). *See, e.g.,* HARRY D. MILLER & MARVIN B. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 1.54 n.8 (1975) (arguing that equitable estoppel should be allowed to defeat § 1624(d)).
34. 743 P.2d 1279 (Cal. 1987).
36. *Id.* at 1284-88.
37. *See id.* at 1289-90 & n.12.
38. *See infra* part III.
Part IV offers such an analysis, ultimately suggesting that the Phillippe court’s fortification of section 1624(d) is irreconcilable with the current form of the Buckaloo tort. Specifically, it makes no sense to continue to allow brokers barred from recovering against their promisors by section 1624(d) to nevertheless recover their fees from other transacting parties (i.e. sellers and buyers) without requiring a hint of misrepresentation. Because transacting parties stand in the same financial position with respect to the payment of brokerage expenses, this tort eviscerates the real estate brokers’ statute of frauds.

Therefore, in part V, a method is proposed to reconcile the Della Penna decision and the Buckaloo decision with the real estate brokers’ statute of frauds, California Civil Code section 1624, subdivision (d). Specifically, brokers should no longer be allowed to recover based upon intentional interference with prospective economic advantage against a transacting party, unless the defendant-interloper has thwarted the broker’s expectancy of receiving a commission through fraudulent misrepresentation. This will adequately protect bro-

39. See infra part IV.
41. See infra part IV.E.
42. See infra part V. This comment focuses strictly on situations where a real estate broker brings an action based upon intentional interference with prospective economic advantage against a transacting party (i.e. a buyer or seller). Again, this is the precise scenario presented by the Buckaloo decision. Buckaloo v. Johnson, 537 P.2d 865, 866-67 (Cal. 1975), overruled by Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). In such instances, the author offers an answer to the question posed by the Della Penna majority: What type of wrongful conduct supports a cause of action based upon intentional interference with prospective economic advantage? That answer: fraudulent misrepresentation. See discussion infra part V. In short, this comment proposes that a broker seeking recovery based upon intentional interference with prospective economic advantage be required to demonstrate: (1) an economic relationship between broker and vendor or broker and vendee containing the probability of future economic benefit to the broker; (2) knowledge by the defendant of the existence of the relationship; (3) fraudulent misrepresentation on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant. See infra part V. As to the third element, existing case law merely requires “intentional acts on the part of the defendant designed to disrupt the relationship.” Buckaloo, 537 P.2d at 872.
kers and harmonize the Buckaloo tort with the Phillippe court's more recent treatment of the equitable estoppel doctrine.\textsuperscript{43}

II. BACKGROUND

A. The Real Estate Brokers' Statute of Frauds\textsuperscript{44}

Twenty-four states require real estate brokers to obtain written brokerage contracts.\textsuperscript{45} Most of these states, including California,\textsuperscript{46} prohibit brokers from recovering compensation for services rendered pursuant to unwritten agreements.\textsuperscript{47} The California Supreme Court, in 1987, characterized the state's century-old real estate brokers' statute of frauds as "a consumer protection statute, perhaps the state's first."\textsuperscript{48}

Beyond the certainty afforded by other statute of frauds legislation, this act furnishes additional protections.\textsuperscript{49} First, it shields the public from the imposition of unwanted brokerage relationships and resultant contractual liability.\textsuperscript{50} Second, the statute reduces the unfounded and multiple claims especially prevalent in the real estate service sector.\textsuperscript{51}

\textsuperscript{43} See discussion infra part V.
\textsuperscript{44} The term "real estate brokers' statute of frauds" is commonly used in New Jersey to describe that state's statutory requirement for documented brokerage transactions. R.A. Intile Realty Co. v. Raho, 614 A.2d 167, 174 (N.J. Super. Ct. Law Div. 1992).
\textsuperscript{46} CAL. CIV. CODE § 1624(d) (West 1995).
\textsuperscript{48} Phillippe v. Shapell Indus., 743 P.2d 1279, 1289 (Cal. 1987).
\textsuperscript{49} Id. at 1289-90.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 1289 n.12.
For most people, the purchase or sale of a residence is the most important type of financial transaction they will ever make. In the commercial setting, the importance of real estate transactions is of similar significance to the parties involved. With so much at stake, the aims of the real estate brokers' statute of frauds are especially beneficial.

1. A Shield Against Unwanted Brokerage Relationships

The California Supreme Court has observed that Civil Code section 1624, subdivision (d), serves a cautionary purpose: By requiring brokers to obtain written authority to act for compensation, the legislature reminds transacting parties (i.e. sellers and buyers) of the serious legal obligation being undertaken. Another court has aptly observed:

Real estate brokers are a necessary and beneficial part of a business community. They succeed and benefit the community in proportion to their industry, ingenuity, aggressiveness and persistence. However, the imposition of their services upon unwilling recipients and attempts to create contractual relationships and resultant liability for commissions should be viewed with some degree of strictness to prevent unwary members of the public from being victimized by the aggressiveness of the brokers.

In calling upon the Tennessee Legislature to enact a real estate brokers' statute of frauds in that state, the court continued, "[a] real estate owner who orally expresses a mere willingness to sell his property on certain terms does not obligate himself to sell to the first buyer produced by a volunteer broker."

Transacting parties, at least those aware of the statute of frauds, reasonably expect oral expressions to be nonbinding. And brokers are conclusively presumed to know that brokerage fee agreements must be in writing to be enforceable. It

52. Id. at 1289.
53. Phillippe, 743 P.2d at 1289.
54. Id. at 1290.
55. Id. at 1289-90.
57. Id.
is hardly surprising, therefore, that a general understanding exists in the real estate service sector that discussions concerning brokerage services are merely tentative until written down and signed.\textsuperscript{60}

2. Reduces Unfounded and Multiple Claims

The California Supreme Court has also observed that section 1624(d) protects transacting parties from the assertion of false claims by brokers.\textsuperscript{61} Because brokerage services do not produce a tangible product, disputes often arise as to the services the broker performed and their worth.\textsuperscript{62} To make matters worse, the intangible, highly competitive nature of brokerage services often results in two or more competing brokers claiming a commission arising out of a single transaction.\textsuperscript{63}

3. Brokers Still Rely Upon Unwritten Brokerage Agreements

Despite the important, salutary aims of section 1624(d) and the conclusive presumption that brokers know its mandate,\textsuperscript{64} many brokers routinely rely upon unwritten promises of compensation.\textsuperscript{65} For example, brokers often agree to work on a buyer's oral promise, “If you find me what I want, you'll get your commission from the seller when the deal closes.”\textsuperscript{66} And brokers working for sellers also frequently rely on oral promises, despite the unprofessional nature of such conduct.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{60} See Slawson, supra note 58, at 37.
  \item \textsuperscript{61} Phillippe, 743 P.2d at 1283, 1288; Pac. Southwest Dev. Corp. v. Western Pac. R.R., 301 P.2d 825, 827-28 (Cal. 1956).
  \item \textsuperscript{62} Phillippe, 743 P.2d at 1283, 1288; Pacific Southwest Dev. Corp., 301 P.2d at 827-28.
  \item \textsuperscript{63} Phillippe, 743 P.2d at 1283, 1288; Pacific Southwest Dev. Corp., 301 P.2d at 827-28.
  \item \textsuperscript{64} Phillippe, 743 P.2d at 1286.
  \item \textsuperscript{65} See id. at 1290; see also Mertens & Rowan, supra note 40, at 166; ARTHUR G. BOWMAN & W. Denny MILLIGAN, REAL ESTATE LAW IN CALIFORNIA § 3.14 (7th ed. 1986).
  \item \textsuperscript{67} BOWMAN & MILLIGAN, supra note 65, § 3.14. The authors explain how the use of oral listings may result in hard feelings among brokers. Id. They write: Assume a not too infrequent situation where broker A has an oral listing. Broker A advertises the property for sale and broker B calls him.
In 1987, the California Supreme Court, aware that the pervasive use of unwritten brokerage contracts creates a persistent difficulty, began insisting upon strict application of the real estate brokers' statute of frauds. By striking this posture, the high court closed three decades of speculation that it intended to abrogate the century-old statute.

**B. Equitable Estoppel: The Development of a Doctrine Which Threatened to Abrogate Civil Code Section 1624(d)**

1. **Monarcho v. Lo Greco: California's Leading Case on Equitable Estoppel as a Bar Against the Statute of Frauds**

In *Monarcho v. Lo Greco,* a young man agreed to continue working on the family farm until his parents died. In exchange, his mother and stepfather orally assured him that he would receive the parents' property upon the last spouse's death. Over the next fifteen years, the son devoted his life to making the family venture a success. As a consequence, he sacrificed any opportunity for further education or any chance to accumulate property of his own.

The stepfather died first. It was later discovered that he had devised his share of the promised property to his grandson. At the time, a statute of frauds provision (today designated as California Civil Code section 1624, subdivision (e)) required that agreements which by their terms were incapable of being performed during the lifetime of the promisor be reduced to writing. The California Supreme Court,

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Not wanting B to realize that the listing is only an "oral open" listing, A conceals this fact from B, but does agree to share the commission if B sells the property. B diligently works on the listing believing, in good faith, that a valid listing exists, only to find out later, after considerable time, that his efforts were fruitless.

*Id.*

69. 220 P.2d 737 (Cal. 1950).
70. *Monarcho,* 220 P.2d at 739.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Monarcho,* 220 P.2d at 739.
76. CAL. CIV. CODE § 1624(e) (West Supp. 1996).
77. *Monarcho,* 220 P.2d at 739.
in deciding Monarcho, observed that the controlling question was whether the grandson was estopped from raising a section 1624(e) defense. The supreme court answered this question affirmatively.

The Monarcho decision articulated two distinct tests that allow a promisee to raise estoppel to bar a promisor's statute of frauds defense. One holds that equitable estoppel is appropriate if the promisee has suffered an unconscionable injury as a result of having seriously changed position in reasonable reliance on the oral promise. The other holds that an estoppel defense is properly raised if enforcement of the statute of frauds results in the unjust enrichment of the promisor. In Monarcho, the plaintiff satisfied both tests.

2. Extension of the Monarcho Decision Would Have Abrogated the Real Estate Brokers' Statute of Frauds

In the years following the Monarcho decision, it appeared increasingly likely that the California Supreme Court would soon allow brokers to raise equitable estoppel to bar operation of section 1624(d). The authors of the Restatement (Second) of Contracts have concluded that the availability of this equitable remedy effectively abrogates the requirement that brokers obtain written brokerage contracts. Neverthe-

78. Id.
79. Id. at 742.
80. Id. at 741.
81. Id.
82. Monarcho, 220 P.2d at 741.
83. Id. at 739.
84. See Frederick I. Fox, Equitable Estoppel and the Statute of Frauds in California, 53 Cal. L. Rev. 590, 609 (1965). The author writes: Why should the Statute be strictly applied in the case of contracts for the employment of real estate agents and not in other instances? . . . Such distinctions and limitations make little sense if the inarticulate premise underlying the extension of the estoppel doctrine is that the Statute no longer serves a useful purpose. The explanation for what the courts have done must largely be based on speculation. The courts have gone about as far as possible towards abrogating the Statute of Frauds consistent with the presence of the Statute on the books.

Id.
85. RESTATEMENT (SECOND) OF CONTRACTS § 375 (1981). The authors write: A, a home owner, makes an oral contract with B, a real estate broker, to pay B the usual 5% commission if B succeeds in selling A's house. The state Statute of Frauds contains a provision providing that a real estate broker shall have no right to such a commission unless there is a
less, for more than three decades the high court grappled with the emerging equitable estoppel doctrine in the real estate brokerage context.  

3. The California Supreme Court’s Three Decades of Indecision: 1956 to 1987

a. The Pacific Southwest Case

Six years after the Monarcho decision, in Pacific Southwest Development Corp. v. Western Pacific Railroad, the supreme court narrowly upheld the dismissal of an action brought by a broker to recover a commission, because the broker had failed to satisfy section 1624(d). The defendant had employed the broker to obtain a certain purchase option and, in consideration, the defendant had orally promised to pay the broker a five percent commission if his efforts proved successful. Relying upon this understanding, the broker initiated negotiations but proved unable to secure the desired option. 

Later, the defendant negotiated directly with the seller and obtained the option. Despite the broker’s inability to procure an agreement, the defendant paid the broker a two and one-half percent commission. The unsatisfied broker then sued, seeking recovery of the full five percent commission.

written memorandum of the contract. B sells A’s house for $100,000 and sues in restitution for $5,000, the reasonable value of B’s services. B cannot recover in restitution because the purpose of the Statute would be frustrated if B were allowed to recover as restitution the same amount that had been promised under the contract.

Id. at cmt. a, illus. 3. But see Clinkinbeard v. Poole, 266 S.W.2d 796 (Ky. Ct. App. 1954) (extending availability of equitable estoppel to real estate brokers’ statute of frauds just four years after Monarcho), overruled by Louisville Trust Co. v. Monsky, 444 S.W.2d 120 (Ky. Ct. App. 1969).

86. See Brian M. Englund, Oral Employment Contracts and Equitable Estoppel: The Real Estate Broker as Victim, 26 Hastings L.J. 1503 (1975). The writer observed that “[t]he supreme court seems only to be waiting for the right case and the proper pleadings to invoke an estoppel to assert [section 1624(d)].” Id. at 1513-14.

87. 301 P.2d 825 (Cal. 1956).
89. Id. at 828.
90. Id. at 827-28.
91. Id.
92. Id.
A narrow, four member majority of the supreme court held that such facts established neither unconscionable injury, nor quantum meruit. Therefore, equitable estoppel did not arise. However, Justice Carter dissented. He argued that the broker had met Monarcho's unjust enrichment test, writing: "Suppose plaintiff had devoted all of his time to the project for five years, would there be any doubt that there was both injury and unjust enrichment?" Justice Carter disagreed with the majority's assessment that the broker's efforts had not been a material benefit to the defendant.

b. The Franklin Case

Later, in 1963, the California Supreme Court hinted that equitable estoppel might prove an appropriate remedy for brokers in many future cases involving section 1624(d). Franklin v. Hansen involved a typical oral listing contract between a seller and his broker. The broker had earlier performed property management services for the seller on the subject property, receiving his compensation pursuant to an oral agreement.

The seller, upon deciding to sell this rental property, engaged the broker as his agent. They entered into an oral commission contract. The terms of this agreement were that if the broker procured a purchaser willing to pay $115,000, the seller promised to pay the broker a five percent commission. In reliance upon that contract, the broker ob-

94. Id. at 830-31.
95. Id.
96. Id.
97. Englund, supra note 86, at 1513.
100. Franklin, 381 P.2d at 387.
101. Id.
102. Id.
103. Id.
104. Id.

A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to a commission, if his or her efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which without a break in their continuity result in accomplishment of prime objective [sic] of the employment of the broker who is producing a purchaser ready, willing and able to buy real estate on the owner's terms.

tained several offers of less than $115,000.\textsuperscript{105} The seller refused each, but orally agreed to reduce the $115,000 asking price to $100,000.\textsuperscript{106}

Subsequently, the broker obtained an offer of $100,000.\textsuperscript{107} The broker telephoned the seller with the news, requesting an authorization by telegram to sell the property.\textsuperscript{108} As requested, the seller dispatched the following telegram: "Los Angeles, California . . . D.V. Franklin, 208 Marine Balboa Island California. This is to confirm that I will sell 608 South Bay Front Balboa Island for 100,000 cash this offer good until noon 1-19-60. Chas. P. Hansen."\textsuperscript{109}

On January 19, 1960, the broker advised the seller that the property had been sold.\textsuperscript{110} The owner, nevertheless, refused to complete the transaction or pay the broker's commission.\textsuperscript{111}

The broker then sought to enforce the commission agreement.\textsuperscript{112} In response to the broker's action, the defendant demurred, raising section 1624(d).\textsuperscript{113} The trial court overruled the demurrer, and a trial ensued.\textsuperscript{114} At its conclusion, the broker received a judgment awarding the full commission of $5000.\textsuperscript{115}

On appeal, the supreme court reversed the judgment, ruling that the telegram was insufficient to satisfy section 1624(d).\textsuperscript{116} The majority seized the opportunity that Franklin afforded to observe: "Plaintiff herein has neither alleged nor urged the application of an equitable estoppel, pursuant to which doctrine a party to an oral agreement might be estopped to rely on the statute of frauds in instances where the elements of the doctrine can be established."\textsuperscript{117}

\textsuperscript{105} Franklin, 381 P.2d at 387.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Franklin, 381 P.2d at 387.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Franklin, 381 P.2d at 387.
\textsuperscript{116} Id. at 390.
\textsuperscript{117} Id.
c. The Tenzer Case

More than two decades passed before the supreme court again addressed the equitable estoppel issue in the real estate brokerage context. Then, in 1985, in *Tenzer v. Superscope, Inc.*, the supreme court pointed out that it had never decided "whether brokers may invoke equitable remedies to avoid the sometimes harsh results of the statute of frauds."

The *Tenzer* court observed that the proponents of equitable estoppel had long sought an examination of this issue due to changes in the real estate market. In particular, the supreme court noted Miller and Starr's contention that unlike in 1878 (the year Civil Code section 1624(d) was enacted), modern brokers must negotiate with sophisticated consumers who are often in superior bargaining positions. In such situations, critics of the statute of frauds contended that brokers must rely upon oral promises.

The issue, however, was not squarely before the court because the plaintiff in that case was an unlicensed finder. Although the supreme court allowed the unlicensed finder to raise equitable estoppel to defeat a section 1624(d) defense, it expressly postponed consideration of the equitable estoppel issue where the plaintiff is a broker. Until 1987, thirty-seven years after *Monarcho*, the availability of equitable estoppel to defeat section 1624(d) remained a serious possibility for brokers.

4. Phillippe v. Shapell Industries: Brokers' Presumed Knowledge of Civil Code Section 1624(d) Precludes Their Use of Equitable Estoppel

a. Legislative Developments on the Eve of the Phillippe Decision

In *Phillippe*, the California Supreme Court observed the special importance of real estate transactions to the parties

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 217-18.
126. *Id.* at 217 n.6.
involved.\textsuperscript{127} In the years preceding \textit{Phillippe}, the legislature had enacted a considerable amount of legislation intended to protect those engaging in real estate transactions.\textsuperscript{128} In particular, the listing of real property through brokers had become highly regulated.\textsuperscript{129}

A broker using pre-printed listing agreements, for example, must ensure that the forms contain the following statement in not less than ten-point type and placed near the specification of the commission rate: "\textit{Notice: Both 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 the seller and broker.}"\textsuperscript{130} This act further mandates that the rate or amount of commission be entered manually (i.e. it may not appear as part of the printed form).\textsuperscript{131} Moreover, every exclusive agency listing, exclusive right to sell listing, and buyer-brokerage agreement must include a definite, fixed, and final termination date.\textsuperscript{132}

If the subject property is residential in nature and consists of one to four units, there are two additional obligations imposed upon the broker.\textsuperscript{133} One requires the broker to conduct a "reasonably competent and diligent visual inspection of the accessible areas of the property."\textsuperscript{134} The other requires brokers to provide a statutorily-worded, agency disclosure statement to the prospective sellers prior to the execution of the listing contract.\textsuperscript{135} A broker who fails to promptly provide the agency disclosure may be refused enforcement of an

\textsuperscript{127} Philippe v. Shapell Indus., 743 P.2d 1279, 1289-90 (Cal. 1987).
\textsuperscript{128} \textit{See}, e.g., \textit{CAL. CIV. CODE} § 2079 (West Supp. 1996) (enacted 1985) (imposing duty to inspect residential real property on brokers); \textit{id.} §§ 1102-1102.15 (enacted 1985) (requiring transfer disclosure statement in certain residential real property sales); \textit{id.} § 1675 (enacted 1978) (regulating liquidated damages provisions in purchase and sale contracts for residential real property).
\textsuperscript{129} \textit{See}, e.g., \textit{CAL. BUS. \& PROF. CODE} § 10176(f) (West 1995) (mandating that definite termination date be specified in all exclusive listings for which a real estate license is required); \textit{id.} § 10147.5 (establishing negotiability and notice requirements for real estate commission contracts); \textit{CAL. CIV. CODE} § 2374 (West 1995) (imposing duty on brokers in residential transactions to provide parties with written agency disclosure) (enacted 1986) (repealed 1995 and consolidated in \textit{CAL. CIV. CODE} § 2026 (West Supp. 1996)).
\textsuperscript{130} \textit{CAL. BUS. \& PROF. CODE} § 10147.5 (West 1994).
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} § 10176(f).
\textsuperscript{133} \textit{CAL. CIV. CODE} §§ 2079-2079.5, 2374 (West Supp. 1996).
\textsuperscript{134} \textit{Id.} §§ 2079-2079.5.
\textsuperscript{135} \textit{Id.} § 2374 (repealed 1995 and consolidated in \textit{CAL. CIV. CODE} § 2026 (West Supp. 1996)).
otherwise valid commission claim, despite having performed that contract fully. 136

b. The Phillippe Decision: Sound Policy Reasons Support the Denial of Equitable Estoppel to Brokers

In 1987, the supreme court decided Phillippe v. Shapell Industries, Inc., 137 now the leading case in California on the availability of equitable estoppel to bar a section 1624(d) defense. 138 In Phillippe, the plaintiff-broker helped a corporation locate a tract of land suitable for residential development. 139 At the outset of the their relationship, the broker and the corporation's director of land acquisition reached an oral agreement. 140 The corporation would pay the broker a commission upon its purchase of any land suggested by the broker. 141 The corporation, itself a broker, also promised to include the terms of this oral agreement in any written purchase offer. 142

Four months later, during April 1973, the plaintiff located and presented a seemingly suitable property to the corporation. 143 As earlier promised, the corporation submitted a written purchase offer which incorporated its promise to pay the broker's entire commission once the transaction was com-

136. Huijers v. DeMarrais, 14 Cal. Rptr. 2d 232, 234-35 (Ct. App. 1992). California Civil Code § 2374.5(a) requires that "[t]he listing agent . . . shall provide the disclosure form to the seller prior to entering into the listing agreement." CAL. CIV. CODE § 2374(a) (West 1995). In Huijers, the court of appeal denied a broker his commission as a sanction. Huijers, 14 Cal. Rptr. 2d at 238-39. This common law remedy was fashioned to punish the broker for his failure to promptly furnish the statutorily required agency disclosure form. Id. at 234-35.

The broker and seller had executed an exclusive right to sell listing before the broker furnished the form. Id. at 238. The Huijers court believed that the "full measure of protection that the Legislature intended to provide to the seller cannot be achieved if the listing agent fails to provide the disclosure form prior to entering into the listing agreement." Id. For that reason, the court of appeal held that the broker could not enforce his otherwise enforceable compensation claim. Id. at 234-35.


139. Phillippe, 743 P.2d at 1280-81.

140. Id. at 1280.

141. Id.

142. Id.

143. Id.
However, the parties never completed the sale due to a property defect.145

Then, in August 1973, the broker located another property.146 Over the next six months, the broker attempted to interest the corporation in this ninety-four acre parcel.147 This effort included meeting with its owner and repeatedly providing the corporation with information.148 Approximately two years later, the corporation purchased sixty-three acres of the original ninety-four acres without the plaintiff’s participation.149

The plaintiff then filed an action seeking to enforce the oral, buyer-brokerage contract against the corporation.150 At trial, the plaintiff was allowed to assert equitable estoppel to defeat the corporation’s section 1624(d) defense.151

A trial ensued in which the jury, by special verdict, found that the plaintiff was the procuring cause of the corporation’s purchase and awarded damages of slightly less than five percent of the sales price.152 On appeal, the corporation contended that the trial court erred in estopping its statute of frauds defense.153

The supreme court agreed with the corporation, holding that equitable estoppel was not available to defeat section 1624(d).154 The court observed that equitable estoppel may arise only where the broker’s reliance upon the oral promise was reasonable.155 The Phillippe plaintiff, as a licensed broker, was conclusively presumed to know the requirement of

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144. Phillippe, 743 P.2d at 1280.
145. Id.
146. Id.
147. Id. at 1280-81.
148. Id. at 1280.
149. Phillippe, 743 P.2d at 1280.
150. Id. Buyer-brokerage contracts are more common in California than ever before. Id. Bowman & Milligan, supra note 65, § 3.14. Under such an agreement, the broker’s compensation may be provided in a number of different ways. Id. The buyer may pay the broker an hourly wage; or the sales price is reduced by one-half the commission offered by the seller, and the buyer pays the broker an equal amount; or the buyer’s broker splits the commission offered by the seller with the seller’s broker. Id. See also Kuhl Corp. v. Sullivan, 17 Cal. Rptr. 2d 425, 426-30 (Ct. App. 1993) (discussing the structure of a typical buyer-brokerage agreement in the commercial context).
151. Phillippe, 743 P.2d at 1281.
152. Id.
153. Id.
154. Id. at 1280.
155. Id. at 1286.
Therefore, his reliance upon the corporation’s promise to later reduce the commission agreement to writing was not reasonable.\(^{157}\)

c. An Adequate Protection for Brokers: Equitable Estoppel May Arise in Limited Circumstances Involving Fraud

(1) The Phillippe Court Disapproves the LeBlond Decision

The conclusion that a broker cannot reasonably rely upon a transacting party’s promise to later reduce a commission agreement to writing motivated the Phillippe court to reject a published opinion issued nearly four decades earlier by the California Court of Appeal in *LeBlond v. Wolfe*.\(^{158}\) There, the appellate court permitted a plaintiff-broker to estop the defendant-buyer from raising section 1624(d); the buyer had induced the broker to release the seller from a written obligation to pay a commission by orally assuring the broker that he, the buyer, would pay.\(^{159}\) The Phillippe court observed that in light of the a broker’s presumed knowledge of section 1624(d), it is not reasonable for a broker to sacrifice a written listing contract in reliance upon an oral promise.\(^{160}\) Since reasonable reliance is a necessary element of equitable estoppel, the supreme court disapproved *LeBlond*.\(^{161}\)

(2) The Phillippe Court Endorses the Owens Decision

In contrast to its disapproval of the LeBlond decision, the supreme court explicitly endorsed the court of appeal’s 1980 ruling in *Owens v. Foundation For Ocean Research*.\(^{162}\) There, the plaintiff-broker had orally agreed to act as agent for the defendant-corporation in its sale of certain real property.\(^{163}\)

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156. Phillippe, 743 P.2d at 1286.
157. Id. at 1287.
159. LeBlond, 188 P.2d at 278-80. See also Phillippe v. Shapell Indus., 743 P.2d 1279, 1287 (Cal. 1987) (observing that LeBlond plaintiff alleged to have canceled an enforceable contract).
160. Phillippe, 743 P.2d at 1287.
161. Id.
162. 165 Cal. Rptr. 571 (Ct. App. 1980).
163. Owens, 165 Cal. Rptr. at 572.
The corporation's lawyer falsely assured the broker that the board of directors had reduced the brokerage contract to writing.\textsuperscript{164} Relying upon this statement, the broker procured the eventual purchaser.\textsuperscript{165} Following the sale, the corporation refused to pay the broker's agreed fee, and the broker discovered that the brokerage contract remained unwritten.\textsuperscript{166}

The \textit{Owens} court allowed the broker to estop the corporation's section 1624(d) defense.\textsuperscript{167} The court of appeal distinguished an assurance that an enforceable agreement was in place from a promise to pay a commission.\textsuperscript{168} Because a broker may reasonably rely upon the former despite the broker's presumed knowledge of the statute of frauds, the court held the broker may bar the promisor from raising a section 1624(d) defense.\textsuperscript{169}

The \textit{Phillippe} court confirmed the \textit{Owens} outcome: a broker may estop a defendant's section 1624(d) defense under such circumstances.\textsuperscript{170} Because reasonable reliance on such a false promise remains actionable, the supreme court opined that brokers are adequately protected against fraud committed by transacting parties.\textsuperscript{171}

\section{Interference with Agreements Unenforceable Under Civil Code Section 1624(d): A Tort That Emerged Amidst Pre-Phillippe Uncertainty}

\subsection{General Principles}

At common law, an individual who unjustifiably disrupted the performance of a contract between others was liable in tort to the disappointed promisee.\textsuperscript{172} More than a cen-

\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id. at 573.}
\textsuperscript{168} \textit{Owens}, 165 Cal. Rptr. at 573.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Phillippe v. Shapell Indus.}, 743 P.2d 1279, 1292 (Cal. 1987).
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textsc{William L. Prosser}, \textsc{Torts} 949 (4th ed. 1971). California recognizes two distinct forms of contractual interference: inducement to breach a contract and interference with a contractual relationship. Shamblin v. Berge, 212 Cal. Rptr. 313, 315-16 (Ct. App. 1985). The elements of inducement to breach a contract are: (1) a valid and existing contract with a third party; (2) the defendant's knowledge of the contract and an intent to induce its breach; (3) breach of that contract by the third party; (4) causation of the breach by the defendant's unjustified or wrongful contract; and (5) resulting damages. \textit{Id.} The elements of interference with a contractual relationship are: (1) a valid and existing con-
tury ago, the Queen's Bench observed that the actionable wrong stemmed from the interloper's inducement to sever the parties' relationship. Thus, the interloper was potentially liable even where the relationship had not been cemented by an enforceable contract. In so deciding, the court laid the foundation for the present day tort of intentional interference with prospective economic advantage.

This tort is particularly helpful to a disappointed promisee where the promise is unenforceable due to the statute of frauds. In such cases, the controlling question has often been whether the statute of frauds should also bar the promisee's tortious interference claim. Most often, the courts have refused attempts by interlopers to seek the shelter of a statute of frauds provision, since such laws are intended to protect contracting parties. The New Jersey Supreme Court stated the rationale for this refusal more than three decades ago, in the following language: "[One] who unjustifiably interferes with the contract of another is guilty of a wrong. And since [persons] usually honor their promises no matter what flaws a lawyer can find, the offender should not

tract with a third party; (2) the defendant's knowledge of the contract; (3) intentional and unjustified acts committed by the defendant designed to interfere or disrupt the contract; (4) actual interference or disruption of the contract; and (5) resulting damages. Id.

173. Prosser, supra note 172, at 949.

174. Id.

175. Id. The California Supreme Court has stated the elements of the tort in the real estate brokerage context as:

(1) an economic relationship between broker and vendor or broker and vendee containing the probability of future economic benefit to the broker, (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, (5) damages to the plaintiff proximately caused by the acts of the defendant.


177. See cases cited supra note 176.

178. See cases cited supra note 176.
be heard to say the contract meddled with could not have been enforced.”

On the other hand, many courts have refused to premise liability upon an agreement that violates public policy. One California court, for example, has applied this policy concern to a case involving tortious interference specifically in the context of a real estate broker's commission contract. In *Renaissance Realty, Inc. v. Soriano*, the plaintiff-broker had assisted the Sorianos in their search for a new home. While the Sorianos' search was on-going, the broker entered into an agreement, commonly known as a net listing, with the seller.

The seller and the broker agreed that if the broker sold the property to the Sorianos for $73,000, the broker would earn a $5000 brokerage fee. The seller insisted, however, that he receive $67,000 on the transaction, even if the prop-

179. Harris v. Perl, 197 A.2d 359 (N.J. 1964). In *Harris*, the owner had signed a written listing contract in favor of the broker. *Id.* at 361. In reliance upon this agreement, the broker procured the eventual purchaser of the property. *Id.*

While this written commission agreement was in effect, the owner transferred his title to a creditor in partial satisfaction of a debt. *Id.* Initially, neither the broker nor the buyer knew of this transfer. *Id.* The creditor then informed the buyer of this ownership change, but not the broker. *Id.* The buyer then purchased the property directly from the creditor without the broker's participation. *Id.*

The broker had no contract with the creditor, who was the actual seller of the property. *Id.* The buyer, nevertheless, fraudulently informed the creditor that no broker was entitled to be paid a real estate commission on the sale. *Id.* at 362. The *Harris* court opined that absent the buyer's conduct, the creditor would have recognized the broker as the procuring cause of the buyer's purchase and paid a commission to her. *Id.* at 364. On this basis, the New Jersey Supreme Court affirmed the trial court's judgment against the buyer. *Id.*


182. *Id.*

183. *Id.* at 838-39.

184. "A net listing is an arrangement in which the seller sets a minimum price he or she will take for the property and the agent's commission is the amount the property sells for over that minimum selling price." Black's Law Dictionary 932 (6th ed. 1990).


186. *Id.*
The Sorianos purchased the property for $73,000, but their first attempt to obtain financing failed due to an unsatisfactory appraisal. At that time, Tambaoan, a relative of the Sorianos, induced the Sorianos to withdraw from the transaction. In turn, the Sorianos misrepresented to the plaintiff that they no longer wished to purchase the house. Shortly after the parties canceled their escrow, Tambaoan purchased the home and immediately conveyed it to the Sorianos for $67,000.

The plaintiff brought an action against Tambaoan, asserting interference with a contractual relationship. The court, however, noted that the plaintiff’s failure to disclose the net listing to the Sorianos constituted a breach of the plaintiff’s fiduciary duty. For that reason, the court refused to award damages against Tambaoan, holding that a fraudulently procured listing agreement is not properly the subject of a tortious interference claim.

2. California’s Earliest Case: Sweeley v. Gordon

Nearly a decade before Monarcho created uncertainty over the vitality of section 1624(d), the California Court of Appeal decided its first intentional interference with prospective economic advantage case. In Sweeley v. Gordon, a broker performed the marketing of the seller’s apartment building in reliance upon an oral listing contract. While so engaged, the broker procured the eventual buyer of the prop-

187. Id.
188. Id.
189. Id.
191. Id. at 839.
192. Id.
193. Id.
194. Id. at 838.
196. Id. at 839-40.
198. Id.
199. Id. at 14.
Rather than presenting his offer through the broker, the buyer dealt directly with the seller. Together the parties completed the transaction without the broker's further participation.

The broker claimed the seller had breached the oral listing contract by refusing to pay his commission. As a result, the broker instituted an action that named both seller and buyer as defendants. This complaint charged the buyer with a conspiracy to deprive the plaintiff of the commission that he purportedly earned by procuring the sale.

In resolving Sweeley, the California Court of Appeal ruled that section 1624(d) afforded the seller the legal right to sell to the buyer without paying a commission. The broker had not alleged any otherwise unlawful conduct, such as fraud. Noting that for a conspiracy to be actionable the conspirator must have engaged in unlawful means, the court upheld the sustaining of the buyer's demurrer.

On petition for rehearing, the broker maintained "that [the buyer] wrongfully induced [the seller] to violate his contract with [the broker] and to assert the invalidity of the contract because of the failure to comply with the statute of

200. Id.
201. Id.
203. Id.
204. Id.
205. Id.
206. Id.
208. Sweeley, 118 P.2d at 16. This is strikingly similar to the approach taken recently by the California Supreme Court in Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). See supra text accompanying notes 17-27. There, the high court set forth the elements of the tort of intentional interference with prospective economic advantage as follows:

(1) an economic relationship between broker and vendor or broker and vendee containing the probability of future economic benefit to the broker; (2) knowledge by the defendant of the existence of the relationship; (3) wrongful acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant. See Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740, 743 n.1 & 751 n.5. (Cal. 1995) (emphasis added).
frauds." The court again ruled that merely inducing the seller to stand upon his legal rights was not actionable.210

3. **The Sweeley Decision Erodes Amidst the Uncertainty Created by Monarcho, Pacific Southwest, and Franklin**
   a. **The Zimmerman Decision: Tortious Interference Recovery Allowed Against a Non-Transacting, Third Party**

In *Zimmerman v. Bank of America*,211 a broker sought to recover tort damages for a commission lost due to the interference of an institutional lender.212 The lender’s employee had arranged a meeting between the parties to a real estate exchange.213 Prior to the meeting, the parties had been unacquainted with one another.214 The employee’s purpose in arranging the meeting was to induce the parties to breach their oral fee agreement with the broker.215 The broker had procured the exchange while relying exclusively upon the parties’ oral promise of compensation.216 The bank employee, seemingly aware of the real estate brokers’ statute of frauds, suggested that the parties “save money” by reducing the broker’s fee roughly sixty-six percent.217 The parties adopted the suggestion.218

Barred by Civil Code section 1624, subdivision (d) from recovering against the exchangers on their promise, the broker sought to recover against the bank based upon intentional interference with prospective economic advantage.219 In response, the bank sought to assert section 1624(d) to bar the broker’s claim.220 The *Zimmerman* court, however, rejected the bank’s proposed use of this defense, observing that the status of an institutional lender “fundamentally differs”

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210. *Id.*
211. 12 Cal. Rptr. 319 (Ct. App. 1961).
212. *Zimmerman*, 12 Cal. Rptr. at 320.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
from that of either a buyer or seller of real property.\textsuperscript{221} Therefore, the court held that the bank was not sheltered by the "umbrella of the statute."\textsuperscript{222}

By way of dicta, the unanimous court of appeal panel contemplated the potential application of its holding to a case involving a transacting party, specifically a buyer.\textsuperscript{223} Justice Tobriner, a court of appeal judge in 1961, asked whether a buyer may raise the Civil Code section 1624(d) defense where the buyer — rather than a bank — had tortiously interfered with an unenforceable listing contract.\textsuperscript{224} In such a case, "[i]t might be contended that . . . the buyer . . . stands in the same financial position as the seller."\textsuperscript{225}

Stated differently, as a result of the buyer inducing the seller to assert section 1624(d), the seller incurs less expense and the buyer may purchase the property at a reduced price.\textsuperscript{226} This allegedly occurred in Sweeley.\textsuperscript{227} The Zimmerman court implied that a buyer, as a transacting party, was potentially entitled to the protection afforded by section 1624(d), but held that a bank, not a transacting party, was unprotected.\textsuperscript{228}

b. The Golden Decision

During the decade following Zimmerman, the court of appeal heard several cases that further illuminated the proper

\textsuperscript{221} Id. at 323.
\textsuperscript{222} Zimmerman, 12 Cal. Rptr. at 323.
\textsuperscript{223} Id. at 322-23.
\textsuperscript{224} Id.
\textsuperscript{225} Id., at 323. Transacting parties (i.e. sellers and buyers) stand in the same financial position with respect to the payment of any resultant brokerage fee. \textit{Id.} This is aptly illustrated by the Sweeley fact pattern. Sweeley v. Gordon, 118 P.2d 14, 14 (Cal. Ct. App. 1941). There, the broker received the seller's oral authorization to sell an apartment house for $68,500, in which case the seller promised to pay a $3425 brokerage fee. \textit{Id.} In reliance upon this unenforceable promise, the broker procured a purchaser. \textit{Id.} This purchaser and the seller then agreed that the broker would not be paid and that the price would be reduced to $66,000. \textit{Id.} In other words, by avoiding the payment of the brokerage expense, the seller saved $925 ($68,500 minus $3425 equals $65,075; $65,075 is $925 less than the $66,000 which the seller actually received). The buyer, on the other hand, saved $2500 (purchasing the apartment house for $66,000, rather than $68,500). In this way, the transacting parties transferred the broker's commission of $3425 to themselves (seller's $925 plus purchaser's $2500 equals $3425).
\textsuperscript{228} Zimmerman, 12 Cal. Rptr. at 322-23.
balance between section 1624(d) and brokers' claims of tortious interference. In *Golden v. Anderson*, the plaintiff-broker charged the buyer with having tortiously interfered with an oral listing agreement between the plaintiff and the seller. The fact pattern that first arose in *Sweeley* again faced the court. In *Golden*, however, the buyer deceived the seller; the seller was purposefully misled into believing that no broker had procured the buyer's purchase.

The corporate buyer in *Golden* purchased the orally listed property through the use of a straw person, who insisted that the plaintiff-broker was not involved. Several months after the transaction closed, the seller discovered the deception.

The seller notified the plaintiff, who then demanded that the buyer pay him a commission. The *Golden* court held that the buyer, as a malicious interloper, could not rely upon the statute of frauds to bar the broker's intentional interference with prospective economic advantage claim. Unlike *Sweeley*, however, the buyer (i.e. a transacting party-defendant) had engaged in fraudulent conduct in order to defeat the broker's commission expectancy.

c. *The Friedman Decision*

Less than a year after its decision in *Golden*, the court of appeal faced similar facts in *Friedman v. Jackson*. There, the plaintiff-broker and the sellers had an oral, open listing agreement. The broker presented the property to the de-

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230. 64 Cal. Rptr. 404 (Ct. App. 1967).
231. *Golden*, 64 Cal. Rptr. at 405-07.
234. Id. at 407.
235. Id.
236. Id.
237. Id. at 407-08.
238. See *Golden*, 64 Cal. Rptr. at 407-08.
240. *Friedman*, 72 Cal. Rptr. at 129. "An open listing obligates a seller to pay a commission when a specified broker makes a sale, but which reserves the right of the seller to sell his own property without paying a commission. Such listings may be given to any number of brokers on the same property." BLACK'S LAW DICTIONARY 932 (6th ed. 1990).
fendant-buyers, who responded that the property was "too much money."241 A short time later, the buyers purchased the property directly from the seller, without the broker's participation.242 As in Golden, the buyers misled the seller; here, instead of using a straw person, the buyers represented that a friend, not a broker, had brought the property to their attention.243 Applying both Zimmerman and Golden, the court of appeal refused the defendant's attempted invocation of the statute of frauds.244

Unlike Golden, the Friedman court elaborated upon the importance of the defendant's conduct in determining whether a cause of action for intentional interference with prospective economic advantage will lie.245 In Friedman, Judge Herndon recognized that the Sweeley court had refused to hold a buyer liable for merely inducing the seller's breach.246 However, he found Sweeley distinguishable because there had been no allegation that the buyer in Sweeley had acted fraudulently.247 With this in mind, the Friedman court wrote that even if the defendant could have achieved the same result lawfully, a fraudulent misrepresentation supports a tortious interference claim.248 As in Golden, the Friedman buyer (i.e. a transacting party-defendant) had engaged in fraudulent conduct in order to defeat the broker's commission expectancy.249

4. The California Supreme Court's Buckaloo Decision: Tortious Interference Without a Hint of Misrepresentation

In Buckaloo v. Johnson,250 the owner of an undeveloped parcel on the Mendocino coast, known as Dark Gulch, erected

241. Friedman, 72 Cal. Rptr. at 129-30.
242. Id. at 130.
243. Id.
244. Id. at 131-32.
245. Id.
247. Friedman, 72 Cal. Rptr. at 131.
248. Id.
249. Id.
a sign on her property which read: “For Sale — Contact Your Local Broker.”

On May 3, 1972, the eventual purchaser of the property, Virginia Arness, accompanied by her daughter and a real estate salesperson, entered the plaintiff-broker's office. The salesperson, who was employed by a competing broker, asked if the plaintiff "cooperated with other brokers." The plaintiff indicated that he did.

Following a general discussion of coastal investment property, Arness asked about "the property with the sign," meaning Dark Gulch. The plaintiff knew Dark Gulch well. Years earlier, he had possessed an exclusive right to sell listing on this parcel. In response to Arness' question, the plaintiff was able to provide detailed information regarding its assets and liabilities.

Later, the plaintiff notified the owner of Dark Gulch that should Arness purchase the property, he intended to claim a commission. The plaintiff asserted that he would be the procuring cause of a sale to Arness, as a result of their conversation. For this reason, the plaintiff requested that the owner refer Arness to him should she contact the owner.

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252. Id. at 867.
253. Id. According to the California Department of Real Estate, “[m]ost listing agreements now in common use authorize the listing broker to delegate much of the work of procuring a buyer to cooperating brokers.” CAL. DEP'T OF REAL ESTATE, REFERENCE BOOK 205 (1990).

The salesperson in Buckaloo seems to have been interested in learning whether the broker normally extended an offer of sub-agency to other brokers. The plaintiff-broker in Buckaloo had earlier entered into an exclusive-authorization-to-sell listing contract with Dark Gulch's owner, which had expired in 1968. Buckaloo, 537 P.2d at 866-67. Under such an agreement, the broker possessed "the sole right to sell the property during a time period." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). This means that even if another broker or the owner finds a buyer, the agent will get a commission. Under such an arrangement, a "cooperating broker" is a listing broker who agrees to split the specified commission with another broker (i.e. the selling broker) who is the procuring cause of the buyer's purchase. See generally CAL. DEP'T OF REAL ESTATE, REFERENCE BOOK 220 (1990).

254. Buckaloo, 537 P.2d at 867.
255. Id.
256. Id.
257. Id. at 866-67.
258. Id. at 867.
259. Buckaloo, 537 P.2d at 867.
260. Id.
261. Id.
Weeks later, after learning that Arness had purchased Dark Gulch without his participation, the plaintiff demanded that the owner pay him a commission.\textsuperscript{262} The owner refused.\textsuperscript{263} The plaintiff then brought an action against the owner, Arness, the salesperson, and the salesperson's broker.\textsuperscript{264} The plaintiff maintained that the sign placed upon the property ("For Sale — Contact Your Local Broker") constituted an open listing with nearby brokers.\textsuperscript{265} However, the broker did not allege compliance with Civil Code section 1624, subdivision (d).\textsuperscript{266} Notwithstanding this bar against direct recovery on the implied listing contract, the plaintiff sought to recover against Arness, the buyer, based upon intentional interference with prospective economic advantage.\textsuperscript{267}

The controlling question in Buckaloo was whether a buyer, who otherwise has acted lawfully, may raise the statute of frauds against a broker's intentional interference with prospective economic advantage claim.\textsuperscript{268} This is the same question that the Sweeley court had answered affirmatively thirty-four years before.\textsuperscript{269} Without expressly distinguishing, criticizing, or disapproving the Sweeley decision, the supreme court opted to answer the question in the negative.\textsuperscript{270}

III. THE LEGAL PROBLEM

Two decades ago, the California Supreme Court decided Buckaloo v. Johnson,\textsuperscript{271} a landmark intentional interference with prospective economic advantage case.\textsuperscript{272} This case was the first high court case to consider the tort of intentional interference with prospective advantage in the real estate bro-

\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Buckaloo, 537 P.2d at 867.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 868.
\textsuperscript{267} Id.
\textsuperscript{268} See id. at 867.
\textsuperscript{269} Sweeley v. Gordon, 118 P.2d 842, 842 (Cal. Ct. App. 1941).
\textsuperscript{270} See Buckaloo v. Johnson, 537 P.2d 865, 868-74 (Cal. 1975), overruled by Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). The Sweeley outcome was recently resurrected by the California Supreme Court in Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). See supra note 208.
\textsuperscript{271} 537 P.2d 865 (Cal. 1975), overruled by Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995).
\textsuperscript{272} Buckaloo, 537 P.2d at 865.
kerage context. The elements of the cause of action recog-
nized by the Buckaloo court remained good law despite two
decades of change in the real estate service sector until the
California Supreme Court issued its Della Penna decision in
October of 1995.273

The dispute in Buckaloo arose out of a completed real es-
tate sales transaction.274 William Buckaloo, the plaintiff-real
estate broker, brought an action against the buyer, alleging
that the buyer had prevented him from earning the commis-
sion promised him by the seller.275 The buyer had allegedly
circumvented Buckaloo’s efforts: Following a discussion con-
cerning the merits of the seller’s property with Buckaloo at
his real estate office, the buyer purchased the land without
Buckaloo’s further participation.276 When Buckaloo later de-
mended a commission from the seller, the seller refused.277

The supreme court’s task was complicated, however, by
Buckaloo’s failure to obtain the seller’s signed authoriza-
tion.278 Without a signed agreement, Buckaloo had no claim
against the seller for breach of contract, because absent a
writing such agreements are invalid under Civil Code section
1624, subdivision(d).279

Despite Buckaloo’s lack of recourse against the seller, a
unanimous court permitted Buckaloo to proceed against the
buyer based upon intentional interference with prospective
economic advantage.280 The cause of action serves a valuable
role in California’s economy by protecting brokers from un-
reasonable interference.281 Because brokers’ efforts generally
reduce the economic costs associated with buying and selling
real property, the Buckaloo tort indirectly facilitates efficient
real estate transactions.282

By immunizing brokers against interference, however, the
author believes that the supreme court painted with too
broad a brush: It failed to distinguish between situations in

273. See supra note 175.
274. Buckaloo, 537 P.2d at 866.
275. Id. at 866-67.
276. Id.
277. Id. at 867.
278. Id. at 868.
280. Id. at 873.
281. Perlman, supra note 28, at 124.
282. Id.
which a transacting party (i.e. a seller or buyer) acts forthrightly throughout the entire transaction, from those situations in which one transacting party deceives the other (e.g., making a fraudulent claim that no brokers are involved).\footnote{283} Consider the two following fact patterns which emphasize the ambiguity of the Buckaloo opinion.

In Buckaloo, the buyer might have concealed the plaintiff-broker's involvement from the seller by fraudulently informing the seller that no broker had been involved in the buyer's decision to purchase the land.\footnote{284} Having convinced the seller of this falsehood, the buyer purchased the property at a price substantially less than the seller would have otherwise accepted.\footnote{285} The seller, by avoiding this brokerage expense, obtains the same net amount from the sale, despite accepting a lower purchase price.\footnote{286}

Under this scenario, the author agrees with the Buckaloo outcome. It is unfair to expect the seller, after having been defrauded by the buyer, to pay Buckaloo's commission. It is not unfair, however, to disgorge this ill-gotten gain from the

\footnote{283}{See Buckaloo, 537 P.2d at 872. Specifically addressing the irrelevancy of the buyer's honest conduct, Justice Mosk wrote:

Thus the cases are clear that a prospective purchaser may not induce a seller bound under an oral agreement to breach that agreement and sell to him at a price which necessarily excludes the broker. Where fraud is involved, as in Golden, the actionable wrong stands out in bold relief. Less obvious perhaps, but nonetheless actionable, are the circumstances in which the purchaser, with full knowledge of the economic relationship between broker and seller, intentionally induces the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract.}

\footnote{Id.}{The California Supreme Court, on October 12, 1995, issued its opinion in Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). See supra text accompanying notes 17-27. There, the California Supreme Court recognized that the phrase "intentional acts" was too broad. Della Penna, 902 P.2d at 951. Instead, the high court endorsed the mildly narrower phrase "wrongful acts." Id. The court expressly reserved refinements to the word "wrongful" for later consideration. Id. at 741. Under the Buckaloo fact pattern, the author believes the proper showing is one of "fraudulent misrepresentation." See discussion infra part V.}

\footnote{284}{See Buckaloo, 537 P.2d at 866-67; see also Friedman v. Jackson, 72 Cal. Rptr. 129, 130 (Ct. App. 1968) ("defendants were able to induce the 'owners' to sell the property directly to defendants at a price which . . . did not include plaintiff's agreed commission"); Golden v. Anderson, 64 Cal. Rptr. 404, 406 (Ct. App. 1967) (sale to straw person negotiated "on the basis . . . no broker's commission would be payable").}

\footnote{285}{See Buckaloo, 537 P.2d at 866-67.}

\footnote{286}{See id.}
buyer, who now possess the economic benefit promised by the seller to the broker. Therefore, the Buckaloo decision properly holds the buyer liable in tort for the full amount of the commission. 287

The difficulty with the Buckaloo opinion arises under a different set of facts. The factual basis of the Buckaloo opinion might have been as follows: The buyer may have learned from the seller that the brokerage contract was unwritten. Aware of the real estate brokers' statute of frauds, the buyer merely informed the seller that unwritten brokerage agreements are invalid. 288 So apprised, the seller may have sold to the buyer at a reduced price and refused to pay the broker's commission. 289

This is precisely the scenario alleged by the broker in Sweeley v. Gordon. 290 Under Buckaloo, the buyer is held liable in tort; this time, however, for merely advising the seller that brokerage contracts must be in writing. 291 This latter outcome allows brokers who are guilty of violating section 1624(d) to recover against other transacting parties. 292 Because transacting parties stand in the same financial position with respect to the payment of brokerage expenses, 293 this outcome allows brokers to circumvent the need for signed brokerage contracts. 294 An updated approach to the tort of intentional interference with prospective economic advantage in the real estate brokerage context is needed; one that

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287. See infra part IV.C.
288. See Buckaloo, 537 P.2d at 866-67. A seller under such circumstances may feel that she has been twice cheated by her broker. First, the broker deprived her of the cautionary effect provided through compliance with the real estate brokers' statute of frauds. See supra part II.A.1. Second, the broker obtained her agreement to pay a commission without providing her with the following statutorily-worded disclaimer: "Notice: Both 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 the seller and broker." CAL. BUS. & PROF. CODE § 10147.5 (West 1995).
289. See Buckaloo, 537 P.2d at 866-67.
291. See infra part IV.D.
292. See Mertens & Rowan, supra note 40, at 115-16.
293. See supra note 225 and accompanying text.
294. See supra part II.A.1-2 (setting forth the "sound policy reasons" supporting Civil Code § 1624(d) as articulated by the California Supreme Court). See also Grant v. Halverson, 278 Cal. Rptr. 880 (Ct. App. 1991) depublished by No. S020873, 1991 Cal. LEXIS 3451 (July 25, 1991) (per curiam).
shields brokers from unjustified interference without eviscerating the real estate brokers’ statute of frauds.\textsuperscript{295}

IV. ANALYSIS

A. Phillippe and Buckaloo: Inconsistent Application of Civil Code Section 1624(d)

In the past two decades, an inconsistency has emerged in the application of Civil Code section 1624, subdivision (d) by the California Supreme Court. In \textit{Phillippe v. Shapell Industries, Inc.},\textsuperscript{296} the high court recognized the statute’s “sound policy considerations” and ruled that a broker may not raise equitable estoppel to bar a transacting party (i.e. seller or buyer) from asserting a Civil Code section 1624(d) defense against a broker’s contractual claim.\textsuperscript{297} This rule is subject to a single, narrow exception: Estoppel is permitted only if the broker, charged with knowledge of the relevant law, demonstrates reasonable reliance upon a misrepresentation made by the defendant.\textsuperscript{298}

In contrast to the \textit{Phillippe} court’s insistence on compliance with section 1624(d), the supreme court attaches little significance to a broker’s disregard of section 1624(d) where the broker’s action is based upon intentional interference with prospective economic advantage.\textsuperscript{299} In \textit{Buckaloo v. Johnson},\textsuperscript{300} the high court held a transacting party liable in tort, perhaps for nothing more than persuading another transacting party to stand upon the legal rights that section

\textsuperscript{295} See infra part V. Professor Perlman has made a similar observation regarding the relationship between tortious interference and the real estate brokers’ statute of frauds. Perlman, \textit{supra} note 28, at 124. He writes:

Many jurisdictions require brokerage contracts to be in writing to reduce fraudulent claims for commissions. This in turn creates incentives for the broker to find alternative means of recovery, such as suing the buyer or seller or both for interference with his expectancy of a commission. Courts thus must craft rules that both prevent fraudulent claims by brokers and prevent buyers or sellers from unjustly appropriating brokers’ efforts. A general tort of interference with economic expectancy, though available and used for this purpose, seems too blunt an instrument.

\textit{Id.}

\textsuperscript{296} 743 P.2d 1279 (Cal. 1987).
\textsuperscript{297} \textit{Phillippe}, 743 P.2d at 288-90.
\textsuperscript{298} \textit{Id.} at 291-92.
\textsuperscript{299} See infra IV.A.2.
\textsuperscript{300} 537 P.2d 865 (Cal. 1975), \textit{overruled} by Della Penna v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995).
1624(d) afforded her. The contradiction created by the Phillippe and Buckaloo decisions is best demonstrated through the following illustrations.

1. Two Illustrative Examples
   a. Illustration A

   A seller is willing to sell her residence for $100,000. A broker agrees to perform the marketing of the home. The terms of their understanding are that if the broker procures a purchaser who is willing and able to pay a purchase price of $100,000, the seller will pay the broker $6000. The broker complies with section 1624(d), insisting that the seller sign a written contract incorporating these terms. The seller does so.

   In reliance on the seller's promise, the broker shows the home to prospective purchasers. The seller is present when the broker and the eventual buyer make their inspection. Both transacting parties are aware of section 1624(d) and the written nature of the brokerage contract.

   In the presence of the seller and broker, the buyer suggests that the sales price be reduced to $94,000. In exchange, the buyer orally promises to pay the broker $6000 if the broker will release the seller from any obligation to pay a commission. The seller and broker agree to these terms, unaware that the buyer intends to later refuse to pay the broker. The parties complete the transaction, but the broker is never paid.

   b. Illustration B

   A seller is willing to sell his residence for $100,000. A broker agrees to perform the marketing of the home. The terms of their understanding are that if the broker procures a purchaser who is willing and able to pay a purchase price of $100,000, the seller will pay the broker $6000. The broker fails to comply with section 1624(d), allowing this understanding to remain unwritten.

301. See infra IV.A.2.
In reliance on the seller's promise, the broker shows the home to prospective purchasers. The seller is present when the broker and the eventual buyer make their inspection. The buyer, but not the seller, is aware of section 1624(d). Both know that the listing contract between the seller and the broker is unwritten.

In the presence of the broker, the buyer informs the seller that section 1624(d) renders unwritten brokerage contracts invalid. The buyer observes that if the sales price is reduced to $97,000 and the broker is not paid, then both seller and buyer will be $3000 ahead. The seller adopts this suggestion. The parties complete the transaction, and the seller, asserting section 1624(d), refuses to pay the broker.

2. The Phillippe/Buckaloo Inconsistency

In Illustration A, the buyer may assert section 1624(d) to defeat the broker's enforcement of the oral contract. In response, the broker might hope to raise equitable estoppel. Having seriously changed position upon the buyer's oral promise, the broker argues, it would be an injustice to allow the buyer to rely upon section 1624(d).

For almost four decades, the California Court of Appeal accepted the broker's equitable estoppel argument. In 1987, however, the California Supreme Court rejected this outcome. In so ruling, the high court explained that an essential element of equitable estoppel is reasonable reliance upon the promise. As a state licensee, the broker is conclusively presumed to know that brokerage fee agreements must be in writing to be valid. Therefore, the supreme court ruled that the broker acts unreasonably in releasing the seller from an enforceable obligation in reliance upon the buyer's oral promise. Thus, in Illustration A, after Phillippe, a statute of frauds defense will bar an action by the broker to recover the lost commission.

305. See id.
306. See id.
307. See id.
308. Id. at 1288-89.
309. Phillippe, 743 P.2d at 1286.
310. Id.
311. Id. at 1287.
312. See id.
The *Phillippe* court further explained that "sound policy reasons" support this outcome.\(^{313}\) One, brokers are adequately protected by the educational prerequisites to obtaining a state license.\(^{314}\) Two, this outcome effectuates the legislature's growing desire to have documented transactions as a means of protecting the public.\(^{315}\) Three, brokers are further encouraged to obtain written brokerage contracts. Written brokerage contracts are beneficial because they caution those dealing with real estate brokers and also reduce the fraudulent and multiple claims that are especially common in the real estate service sector.\(^{316}\)

In Illustration A, however, the broker initially complied with the statute of frauds. The broker obtained a written contract, but later released the seller in reliance upon an oral assurance of compensation made by the buyer. While the supreme court's refusal to recognize an estoppel on such facts may seem unduly harsh toward brokers, it is consistent with the court's policy-based discussion. However, this outcome cannot be reconciled with the supreme court's allowance of a full recovery based upon Illustration B.\(^{317}\)

In Illustration B, the broker *never* obtained a writing in spite of the conclusive presumption that the broker knew a writing was legally required.\(^{318}\) From the outset, the broker in Illustration B voluntarily assumed the risk that the seller would refuse to pay the orally promised commission.\(^{319}\)

Moreover, unlike in Illustration A, the buyer was innocent of misrepresentation. The buyer merely provided the seller with truthful information affecting the transacting parties' mutual interest. The seller remained free to disregard the buyer's suggestion and compensate the broker or to refuse to do so, instead standing upon the legal right afforded by *Phillippe* and section 1624(d).

Although in Illustration A the broker recovers nothing, in Illustration B the broker is entitled to recover the entire $6000 commission from the buyer based upon intentional in-

\(^{313}\) Id. at 1288.

\(^{314}\) *Phillippe*, 743 P.2d at 1290.

\(^{315}\) Id. at 1289-90.

\(^{316}\) Id. *See also infra* part II.A.1-2.


\(^{318}\) *Phillippe*, 743 P.2d at 1288-91.

\(^{319}\) *See id.* at 1286-87.
terference with prospective economic advantage.\footnote{320}{Buckaloo, 537 P.2d 865.} In both illustrations, however, the statute of frauds bars recovery against the seller.\footnote{321}{See id. at 868.}

B. The Buckaloo Decision Reflects Contemporaneous Uncertainty Over the Vitality of Civil Code Section 1624(d)

In 1975, criticism of section 1624(d) was pervasive.\footnote{322}{MILLER \& STARR, supra note 33, § 1.54; Englund, supra note 86; Fox, supra note 84, at 602, 609. See generally Lawrence L. Lasser, The Real Estate Broker's Commission — Oral Agreements and the Statute of Frauds, 10 RUTGERS L. REV. 410 (1955-1956) (criticizing the New Jersey real estate brokers' statute of frauds).} Just two months before the Buckaloo court issued its decision, one commentator lamented the plight of real estate brokers as “victims” engaged in “the only occupation [in California] where contracts of employment are specifically required by the statute of frauds.”\footnote{323}{Englund, supra note 86, at 1513-14.}

In the same year, Miller and Starr pointed out that brokers often dealt with sophisticated principals who possessed superior bargaining positions.\footnote{324}{Id.} Brokers under such circumstances, the authors maintained, cannot insist upon written contracts and, therefore, the court should be more receptive to claims of equitable estoppel.\footnote{325}{Id.}

At the time of the Buckaloo decision, Franklin was the last California Supreme Court case to have addressed the estoppel issue.\footnote{326}{Phillippe v. Shapell Indus., 743 P.2d 1279, 1288 (Cal. 1987).} The Franklin dictum spawned justified speculation that the court was merely waiting for appropriate facts and pleadings to establish the availability of estoppel to bar the purportedly harsh and unjustified effect of Civil Code section 1624(d).\footnote{327}{Englund, supra note 86, at 1513-14.}

Importantly, Franklin was not an extraordinary case, and the ability of brokers to raise estoppel under parallel circumstances would have abrogated the statute.\footnote{328}{Phillippe v. Shapell Indus., 743 P.2d 1279, 1288 (Cal. 1987).} Although the Phillippe court ultimately ruled soundly against brokers in this regard twelve years later, it was in this uncertain at-
mosphere that the Buckaloo court weighed the formal requirement of section 1624(d) against a broker's claimed loss of an advantageous relationship. There, the high court implicitly discounted the importance of signed writings and opted to protect a broker who claimed to have performed a valuable service in bringing together the transacting parties.

C. An Adequate Protection for Brokers: Intentional Interference With Prospective Economic Advantage Recovery Against Transacting Parties in Circumstances Involving Fraudulent Misrepresentation

Although the Buckaloo tort does not require a showing of fraudulent conduct by the defendant, the supreme court was aware that its holding would protect brokers against deceit. After Buckaloo, a broker who loses a commission through the intentional acts of a transacting party may obtain recovery based upon intentional interference with prospective economic advantage. As the Phillippe court acknowledged, brokers, despite their presumed knowledge of the law, must be protected against fraud. Otherwise, their efforts may be appropriated without compensation. This weakens the incentive to provide brokerage services and, thereby, increases the economic costs associated with buying and selling real property.

It is not surprising, therefore, that the prevention of fraud by transacting parties played an important — albeit implicit — role in the Buckaloo rationale. This is illustrated by an examination of the Buckaloo court's use of precedent: specifically, Golden v. Anderson and Friedman v.

330. See id. at 868-74.
331. See id. at 872.
332. Id. at 868.
335. Perlman, supra note 28, at 124.
337. 64 Cal. Rptr. 404 (Ct. App. 1967).
Each of these cases merited elaborate discussion in the Buckaloo opinion and involved fraud perpetrated by a real estate buyer that was intended to deprive the plaintiff-broker of a commission. The Buckaloo panel observed that "[w]here fraud is involved, as in Golden, the actionable wrong stands out in bold relief."

In Golden, the buyers acquired the property through the use of a straw person. In Friedman, the buyers led the seller to believe that a friend had brought the property to their attention. In both cases, one transacting party committed a fraudulent misrepresentation against the other and, as a result, the broker suffered the loss of an advantageous relationship.

D. Buckaloo Goes Too Far: Liability Imposed on Transacting Parties Without a Hint of Misrepresentation

Buckaloo differs from Golden and Friedman: there was no hint of misrepresentation committed by the buyer in Buckaloo. As early as 1941, the California Court of Appeal had expressly considered this issue: whether a buyer, who otherwise acts lawfully, may be liable for inducing a seller to stand upon the legal rights that section 1624(d) affords. The Sweeley court concluded that such conduct was not actionable.

In 1975, the Buckaloo court arrived at the opposite conclusion. In reaching this decision, the Buckaloo court neglected to distinguish, criticize, or disapprove of the Sweeley holding. Four years later, the Restatement (Second) of Torts implicitly rejected the Buckaloo rationale. Instead, section 772 of the Restatement follows the Sweeley approach and cites Sweeley in the comments following that section. In pertinent part, section 772 reads: "One who intentionally

338. 72 Cal. Rptr. 129 (Ct. App. 1968).
339. Friedman, 72 Cal. Rptr. at 129; Golden, 64 Cal. Rptr. at 406-07.
340. Buckaloo, 537 P.2d at 872.
341. See id.
343. Id.
344. Buckaloo, 537 P.2d at 872.
345. See id. at 868-82.
347. Id.
causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relations, by giving the third person (a) truthful information . . . .”

Illustration B, above, demonstrates how *Buckaloo* establishes liability even where the buyer-defendant has merely imparted truthful information to the seller. The buyer informs the seller that section 1624(d) bars enforcement of the oral commission arrangement. So informed, the seller refuses to pay the broker. Under the Restatement view, the broker cannot recover the orally promised commission from the buyer through tortious interference.

E. The Buckaloo Fact Pattern: A Case Study in How to Eviscerate the Real Estate Brokers' Statute of Frauds

The need to protect brokers against interlopers must be weighed against the legislature's insistence upon written brokerage contracts. Ironically, the *Buckaloo* decision provides a fact pattern that amply illustrates the importance of section 1624(d) in protecting the public from an overzealous broker.

Recall that Arness, the buyer, desired to locate and purchase coastal development property. For that purpose, she enlisted the services of a real estate salesperson. While accompanied by her daughter and the salesperson, she discovered "Dark Gulch," a potentially suitable property upon

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348. *Id.* Comment b addresses this privilege in strong language:

There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested.

*Id.* cmt. b.

349. See supra part IV.A.2.


352. See id.
which a sign had been erected, reading “For Sale — Contact Your Local Broker.” The salesperson must have been unfamiliar with the property.

Together, the group entered the plaintiff-broker’s real estate office. Shortly after their entrance and before the discussion turned to Dark Gulch, the salesperson asked if the plaintiff “cooperated with other brokers.” By positing this question, the salesperson hoped to ensure that the plaintiff would not believe himself to be entitled to a selling agent’s commission if the salesperson later negotiated the purchase of Dark Gulch on Arness’ behalf.

Although the plaintiff may have cooperated with other brokers on occasion, the plaintiff was not in a position to cooperate with another broker on the sale of Dark Gulch. Cooperation means commission splitting and, under the implied agreement that the broker later claimed to have had with the seller, the plaintiff was not entitled to a commission unless he procured the buyer.

The plaintiff concealed this fact to prevent the buyer and the salesperson from dealing directly with the seller. In other words, the plaintiff imposed an unwanted brokerage relationship upon Dark Gulch’s owner, thereby defeating the cautionary purpose of section 1624(d) identified by the California Supreme Court.

In some manner not explained by the Buckaloo opinion, the buyer discovered this concealment and purchased the property without the plaintiff’s further assistance. Arness could be liable under Buckaloo’s holding for informing the seller that an unwritten listing is not enforceable, if that information induced the seller to refuse to pay the broker’s

353. See id.
354. See id.
355. See id.
356. Buckaloo, 537 P.2d at 867. Had the plaintiff possessed an enforceable exclusive listing with the seller, the plaintiff would have been entitled to a commission notwithstanding the salesperson having procured the buyer. See supra note 253. By asking if the plaintiff “cooperated with other brokers,” the salesperson questioned his willingness to split his commission with a selling broker. See supra note 253.
357. See supra note 253.
358. See supra note 240.
359. See Bowman & Milligan, supra note 65, § 3.14.
361. Id. at 867.
commission. This ignores the Restatement's truthful information privilege.

This result also eviscerates the other goal of section 1624(d) identified in Phillippe. The broker's resulting action against Arness vividly illustrates how the Buckaloo tort subjects transacting parties to multiple commission claims arising out of a single transaction. Assume that at trial, the fact finder believed the plaintiff had been the procuring cause of Arness' purchase under an unwritten brokerage agreement. It is likely that Arness or the seller had already paid a commission to the salesperson accompanying her at the close of escrow. A judgment awarding the plaintiff a commission would subject the transacting parties to multiple liability for commissions arising out of a single transaction. The Phillippe court observed that section 1624(d) strives to prevent this.

Common experience alone may be an insufficient protection against a sophisticated and overzealous broker. In the ordinary course of affairs, it is unusual to incur liability merely by entering into a place of business open to the public and engaging the proprietor in casual conversation. This imputes to the general public an understanding of the doctrine of procuring cause. This pitfall for the unwary is especially troublesome due to the Buckaloo plaintiff's pecuniary interest in concealing the tenuousness of his relationship with Dark Gulch's owner.

The plaintiff was aware that he lacked an enforceable brokerage agreement on Dark Gulch. To protect his interests and satisfy the statute of frauds, the plaintiff should have asked the buyer to execute a written buyer-brokerage agreement prior to discussing the advantages and disadvantages of Dark Gulch. This contract would have stated that if the buyer purchased Dark Gulch as a result of the plaintiff's

362. Id. at 872.
365. In overruling the trial court's sustaining of the defendants' demurrer, the California Supreme Court accepted as true the plaintiff-broker's claim to have been the procuring cause of the Arness purchase. Buckaloo, 537 P.2d at 866-67.
366. Phillippe, 743 P.2d at 1289 n.12.
367. See Bowman & Milligan, supra note 65, § 3.14.
368. A licensed broker is conclusively presumed to know the requirement of Civil Code § 1624(d). Phillippe, 743 P.2d at 1286.
efforts, the buyer guaranteed that the broker would receive a specified commission, if not from the seller then from the buyer.\textsuperscript{369} Presented with such a document, Arness would have understood the potential importance of her single, perhaps brief, conversation with the plaintiff. Had she signed that document, the broker would then have possessed an enforceable commission claim under section 1624(d).

\section*{V. Proposal}

Two decades ago, the California Supreme Court set forth those five elements that a real estate broker must establish to recover lost compensation based upon the tort of intentional interference with prospective economic advantage.\textsuperscript{370} \textit{Buckaloo v. Johnson}\textsuperscript{371} requires:

\begin{quote}
(1) an economic relationship between broker and vendor or broker and vendee containing the probability of future economic benefit to the broker, (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, (5) damages to the plaintiff proximately caused by the acts of the defendant.\textsuperscript{372}
\end{quote}

In instances where the defendant is a transacting party (i.e. seller or buyer), the author offers the following revision for California courts in their struggle to apply the \textit{Della Penna} decision in the real estate brokerage setting: "(3) \textbf{intentional acts fraudulent misrepresentation} on the part of the defendant designed to disrupt the relationship."\textsuperscript{373}

\textsuperscript{369} Near the specified commission, the buyer would have also found the legislature's required commission disclaimer. \textit{See} CAL. BUS. & PROF. CODE \S 10147.5 (West 1994). \textit{See also supra} note 288 and accompanying text (setting forth required statutory language). The specified commission rate or amount would have been hand written or typed in, as the legislature has mandated that the commission rate not be pre-printed in such forms. \textit{See} CAL. BUS. & PROF. CODE \S 10147.5 (West 1994). Moreover, this agreement would have stated a definite termination date. \textit{See} CAL. BUS. & PROF. CODE \S 10176(f) (West 1994).


\textsuperscript{371} \textit{Id.}

\textsuperscript{372} \textit{Id. at} 872.

\textsuperscript{373} On October 12, 1995, the California Supreme Court issued its opinion in \textit{Della Penna} v. Toyota Motor Sales, USA, Inc., 902 P.2d 740 (Cal. 1995). \textit{See supra} text accompanying notes 17-27. There, in a non-real estate brokerage context, the high court altered the \textit{Buckaloo} tort to require a showing of "wrongful acts," rather than merely "intentional acts." \textit{Della Penna}, 902 P.2d at 741-
A. Shields Brokers Against Unjustified Interference

This proposed revision harmonizes the Buckaloo holding with the supreme court's more recent discussion of Civil Code section 1624, subdivision (d), in Phillippe v. Shapell Industries. There, the high court articulated the "sound policy considerations" favoring strict application of the statute. To foster compliance, the Phillippe court refused to allow a broker to raise equitable estoppel to bar a transacting party's statute of fraud defense. To assuage brokers' fears that this would leave them unprotected, however, the supreme court carefully explained that such a remedy is available where the broker reasonably relies upon a misrepresentation of the defendant. Where, for example, a broker is informed that the principal's promise to pay a commission has been reduced to writing — when in fact it has not — the broker may raise this equitable bar against the principal's statute of frauds defense.

In the same way, allowing brokers to recover against transacting parties based upon tortious interference only upon a showing of the transacting party acted deceitfully also affords adequate protection. For example, as allegedly happened in Buckaloo, buyers occasionally locate suitable property with the assistance of a broker and then circumvent the broker by dealing directly with the property's owner. Often the transaction is completed but no commission is paid.

Where the broker has complied with section 1624(d) by obtaining a signed brokerage agreement, the broker is enti-
tled to enforce that contract directly against the seller. Where the broker has merely an unwritten contract, the broker will be barred by the statute of frauds from recovering directly upon that contract.\textsuperscript{382} Moreover, absent a showing that the seller acted fraudulently, the broker will not be allowed to assert equitable estoppel to defeat the seller’s statute of frauds defense.\textsuperscript{383}

B. \textit{Effectuates the Sound Policy Reasons Supporting the Real Estate Brokers’ Statute of Frauds}

The broker’s incentive to bring a tort action against another transacting party (the buyer, in the above example) is naturally heightened where the statute of frauds bars an action against the seller.\textsuperscript{384} Because transacting parties stand in the same financial position with respect to the payment of resultant brokerage expenses, a cause of action based upon intentional interference with prospective economic advantage is essentially equivalent to direct recovery on the unwritten promise.\textsuperscript{385} Under the revision to the \textit{Buckaloo} tort proposed here, however, the broker will also be required to demonstrate fraudulent conduct as an element of tortious interference. Allowing such recovery without some hint of misrepresentation eviscerates the statute of frauds.\textsuperscript{386} In this way, the \textit{Buckaloo} tort renders the public vulnerable to the imposition of unwanted brokerage relationships\textsuperscript{387} and subject to the unfounded and multiple claims of brokers.\textsuperscript{388}

IV. \textbf{Conclusion}

The California Legislature has long desired to protect the public by having real estate brokerage contracts in writing. To further this goal, legislation rendering unwritten agreements invalid was enacted more than a century ago. Even at this early date, the legislature seemingly realized that the very nature of the real estate services too often creates un-

\begin{itemize}
  \item [382.] Phillippe v. Shapell Indus., 743 P.2d 1279, 1283-87 (Cal. 1987).
  \item [383.] \textit{Id.} at 1291-92.
  \item [384.] Perlman, \textit{supra} note 28, at 126.
  \item [385.] \textit{See supra} note 225 and accompanying text.
  \item [386.] Perlman, \textit{supra} note 28, at 126.
  \item [387.] \textit{See supra} part II.A.1.
  \item [388.] \textit{See supra} part II.A.2.
\end{itemize}
wanted brokerage relationships and generates unfounded
and multiple claims by brokers.

After three decades of uncertainty surrounding the doc-
trine of equitable estoppel and its potential to abrogate the
real estate brokers' statute of frauds, the California Supreme
Court, in Phillippe v. Shapell Industries, recognized the stat-
ute's "sound policy considerations" and insisted upon its rig-
orous application. Specifically, the Phillippe court held that a
broker may not raise equitable estoppel to bar a Civil Code
section 1624, subdivision (d) defense. An exception is made
only where the defendant has engaged in fraudulent conduct
which the broker, charged with knowledge of the statute of
frauds, reasonably relies upon.

The author has proposed broadening this holding to in-
clude instances where brokers seek damages against trans-
acting parties (i.e. sellers and buyers) based upon intentional
interference with prospective economic advantage. Under
the former authority of Buckaloo v. Johnson — a case decided
more than a decade before Phillippe — brokers could recover
a brokerage fee in tort from a transacting party who merely
advises the broker’s promisor that unwritten brokerage
agreements cannot be enforced. The availability of such a
cause of action without a hint of misrepresentation eviscer-
ates the real estate brokers’ statute of frauds.

Perry J. Woodward*

* The author wishes to dedicate this effort to Patricia Ann Good. Thanks,
Mom.