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THE BUSINESS BROKER AND THE OKLAHOMA REAL ESTATE LICENSING CODE

A business broker is one who, for a fee, commission or other valuable consideration, negotiates the transfer or sale of a business as a going concern. As one court has stated: "Such a transaction involves . . . the sale of the business, its assets, trademarks, goodwill and real and personal property, all as part of a single sale of the business as such."¹ Typically the business broker agrees to perform his service for a commission based on the purchase or selling price of the business. This note examines a problem often faced by the business broker: whether upon procuring the transfer or sale of a going business, an element of which is real estate or an interest therein, the business broker must be licensed under the appropriate real estate licensing statute. Stated more basically, is a business broker a real estate broker and consequently required to be licensed as such?

The question has been litigated in a number of states with clear majority and minority positions emerging. While a minority of states have ruled that business brokers are not real estate brokers, the majority of jurisdictions disagree, requiring that they be licensed accordingly.² Differences in the various state real estate licensing schemes play a key role in the minority-majority split and should be analyzed with a view toward the purposes of regulatory legislation in this area. Although many states have settled the issue through careful draftsmanship, other states have retained vague and general statutory language which is subject to a broader application than either the legislative intent or regulatory purposes warrant.

A number of states with vague real estate licensing statutes, including Oklahoma, have not ruled on the business broker issue; therefore a significant portion of this note will be devoted to an analysis of the factors which should be considered in resolving the issue in these states.

1. *Claggett v. American Bowling & Billiard Corp.*, 48 N.Y.S.2d 856, 856-57 (Sup. Ct. 1944).

2. *See* Annot., 167 A.L.R. 774 (1947); Annot., 88 A.L.R. 1422 (1934); Annot., 56 A.L.R. 480 (1928).

These factors consist primarily of basic policy considerations which will be discussed initially in the context of the New York minority rule. After comparing the interpretation of the New York statute with litigation in other jurisdictions, the discussion will turn to the Oklahoma real estate licensing statute in an attempt to identify the current status of the business broker in Oklahoma.

The Minority Rule

The minority rule holds that where the central or dominant feature of a transaction is the sale of a business as a going concern rather than the transfer of real estate, the business broker need not be licensed as a real estate broker. This rule evolved from a 1926 decision of the New York Court of Appeals in *Weingast v. Rialto Pastry Shop, Inc.*³ In that case the plaintiff business broker sued to recover a commission earned by negotiating the sale of a restaurant, including a lease of the premises, as a going business. As a defense to this claim, the defendant seller argued that the plaintiff was not properly licensed under the New York real estate licensing code and therefore was not entitled to a commission.⁴ The six-to-one majority, which included Justices Andrews and Cardozo, held that while the restaurant's lease was an important element in the total transaction, the essence of the transaction was to transfer the restaurant as an integrated going business rather than as separate items of real and personal property.⁵

The language of New York's statutory definition of a real estate broker,⁶ if read literally, would seem to include the activities of the

3. 243 N.Y. 113, 152 N.E. 693 (1926). Other jurisdictions which have followed the minority rule include: Arkansas, *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415 (Ark. 1959); Colorado, *Cary v. Borden Co.*, 153 Colo. 354, 386 P.2d 585 (Colo. 1963).

4. 243 N.Y. at 115, 152 N.E. at 694. Real estate licensing laws generally provide that a broker may not maintain a judicial action to recover a commission without demonstrating that he is licensed under the appropriate real estate licensing statute. *See, e.g.*, N.Y. REAL PROP. LAW § 442-d (McKinney 1968); OKLA. STAT. tit. 59, § 858-311 (Supp. 1976).

5. 243 N.Y. at 115-16, 152 N.E. at 694-95. The point made by the court is that even though the lease or location of a particular business may be quantitatively the most significant portion of the transaction, one must look to the central purpose or essence of the transaction to determine its characterization. This is not to say, however, that a quantitative analysis is irrelevant to a determination of the essence of the transaction; it is simply not the *only* consideration.

6. The New York definition of a real estate broker relied on in *Weingast* is found at 1922 N.Y. Laws, ch. 672, § 440 (current version in N.Y. REAL PROP. LAW § 440 (McKinney Supp. 1976-77)). This section provides in part that:

Whenever used in this article "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable con-

business broker in *Weingast*, since the transaction involved a sale or exchange of an interest in real estate. But certain policy considerations, some elucidated by the court and others not, militated against a literal reading of the New York statute. On the strength of these policy considerations, the court concluded: "We do not think . . . [that the New York statutory definition of a real estate broker is] *broad enough* to cover, or was *intended* to cover, every transaction in which an interest in real estate may be part of the subject of the transfer."⁷

In determining that the New York statute was not intended to cover a business broker, the *Weingast* court undoubtedly considered the general purpose of real estate broker licensing legislation.⁸ The real thrust of regulatory legislation in the real estate area is to protect the public, particularly the relatively unsophisticated consumer.⁹ The real estate swindle is a timeless problem, as evidenced by the old joke about

sideration, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an estate or interest in real estate

7. 243 N.Y. at 116-17, 152 N.E. at 694 (emphasis added).

8. Although the *Weingast* decision did not explicitly rely on the regulatory purposes of real estate legislation, an inference to that effect may be drawn from the fact that the New York Court of Appeals in *Roman v. Lobe*, 243 N.Y. 51, 152 N.E. 461 (1926) upheld the constitutionality of the real estate licensing law just prior to the *Weingast* decision. Finding the licensing statute to be rationally related to legitimate police power objectives, Justice Cardozo in *Lobe* commented extensively on the primary purpose of regulation in the real estate area:

The intrinsic nature of the business combines with practice and tradition to attest to the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illegal gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside.

243 N.Y. at 54, 152 N.E. at 462.

9. The real estate licensing statute in New York was "designed to protect dealers in real estate from unlicensed persons who acted as brokers, and to protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in the perpetration of frauds upon it, and to establish protective or qualifying standards to that end." *Dodge v. Richmond*, 173 N.Y.S.2d 786, 787-88 (Sup. Ct. 1958) (emphasis added). See *People v. Sickinger*, 360 N.Y.S.2d 796, 798 (Crim. Ct. N.Y. 1974). Similar reasoning has been given by California courts:

The purpose of the act in question herein was decided by our Supreme Court in *Riley v. Chambers*, 181 Cal. 589, 185 Pac. 855, 8 A.L.R. 418, to be primarily to require that real estate brokers and salesmen be "honest, truthful and of good reputation". It was designed, in other words, to protect the public against unscrupulous operators, and not principally to secure revenue.

Houston v. Williams, 53 Cal. App. 267, —, 200 P. 55, 56 (Dist. Ct. App. 1921) (emphasis added). See *Williams v. Kinsey*, 74 Cal. App. 2d 267, —, 169 P.2d 487, 494 (Dist. Ct. App. 1946). See generally R. SEMENOW, QUESTIONS AND ANSWERS ON REAL ESTATE 439-46 (6th ed. 1969); Note, *Recovery of Commissions by Unlicensed Real Estate Brokers*, 80 DICK. L. REV. 500 (1976).

the sale of the Brooklyn Bridge to the naive tourist. In contrast to the typical real estate transaction involving unsophisticated consumers, however, the business broker generally engages in arms-length transactions with sophisticated business professionals. Therefore, the *status* of the parties with whom the business broker is typically involved minimizes the possibility of overreaching and dishonesty by the broker. In these circumstances, the extension of a real estate licensing statute to include business brokers will not serve the regulatory purposes of the legislation.¹⁰

Moreover, most real estate licensing statutes are aimed at least partially at persons who advertise or hold themselves out as engaged in the business of selling real estate.¹¹ This is not a problem with the business broker as the court in *Weingast* recognized: "The plaintiff does not claim to be a real estate broker. He is a business broker, buying and selling restaurants as places of business or going concerns of which the trade and good will form the subject-matter."¹² It would be a harsh result to deny a broker whose activities have been entirely above-board his justly earned commission merely because of a technical statutory definition. This consequence is rendered especially harsh by the fact that many transactions involve very significant sums of money.¹³ Indeed, brokerage efforts in the sale of large businesses can be entirely lost due to the presence of relatively small interests in real estate.¹⁴

10. A basic premise of this note is that governmental regulation for regulation's sake alone is undesirable. A regulation must sufficiently further a legitimate governmental goal so as to outweigh any hardship placed upon the profession regulated. As previously stated, the primary goal for real estate licensing legislation is the protection of the public—more specifically, the relatively unsophisticated consumer. This is, of course, a perfectly valid goal. See, e.g., *Roman v. Lobe*, 243 N.Y. 51, 152 N.E. 693 (1926). When, however, a regulation provides only nominal protection for the public while resulting in much greater hardship and harm to persons regulated thereunder, the regulation is unjustified. Indeed, one must speculate in such cases whether the real purpose behind the regulation is something beyond its stated purpose. In the real estate area, regulations which do little to protect the public likely are primarily intended to improve the economic position of real estate brokers by reducing competition.

11. See 1922 N.Y. Laws, ch. 672, § 440-a (current version in N.Y. REAL PROP. LAW § 440-a (McKinney 1968)). See also KAN. STAT. ANN. § 58-3002 (Supp. 1975); OKLA. STAT. tit. 59, § 588-102 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6573a, § 2 (Supp. 1976-77).

12. 243 N.Y. at 114, 152 N.E. at 694.

13. See, e.g., *Thomas v. Jarvis*, 213 Kan. 671, 518 P.2d 532 (1974) where the business broker's contract provided for "a 5% commission on the first \$2,000,000 plus a 10% commission on any portion of the sale price over \$2,000,000." *Id.* at —, 518 P.2d at 533.

14. See *id.* The total value of the businesses in *Jarvis* was \$1,183,000, of which only \$252,767 represented real estate. Thus the real estate involved in the sale repre-

Similarly, a contrary ruling in *Weingast* would have also permitted the business broker's client to utilize the real estate licensing statute by design to escape his obligation under an otherwise valid contract to pay a broker's fee.¹⁵ This would render the anomalous result of a client using the licensing statute to swindle the broker when, in fact, the primary purpose of the statute is to prevent the possibility of a broker cheating his client. Of course, this anomaly will only occur in jurisdictions where the statutory definition of a real estate broker is so vague that it fails to give adequate notice to business brokers whose activities could be encompassed by the statute. If proper notice is given by the statutory language, a business broker must either act according to the requirements of the statute, or failing such, not be heard to complain of losing a commission as a consequence.

A final and explicit consideration in *Weingast* was the fact that the New York real estate licensing code carried penal sanctions for its violation.¹⁶ Statutes carrying criminal penalties are always strictly construed to prevent unwarranted expansion of their scope. To do otherwise would be to risk the danger of visiting criminal sanctions upon one

sented merely fourteen percent of the transaction, yet the broker lost his entire commission.

One may wonder why a business broker does not simply acquire a real estate broker's license to be protected against the contingency of a court ruling that his activities are encompassed by real estate broker's regulatory legislation. First, the business broker may not have contemplated that he would be required to be licensed. In addition, the requirements necessary for one to acquire such a license are something more than nominal. See, e.g., OKLA. STAT. tit. 59, §§ 858-302, -303 (Supp. 1976), wherein a potential licensee must meet educational requirements and pass a written examination. This alone is far from objectionable either from the standpoint of protection of the public or as a burden on the business broker. But the Oklahoma statute goes further, providing that passing the examination only grants the applicant the privilege of working for a real estate broker as a real estate sales associate for a period of not less than one year. An additional educational requirement must then be met and a written examination passed before a real estate broker's license can be acquired. The primary purpose of these requirements is typically geared toward the maintenance of competence by brokers engaged in the transfer of residential and commercial real estate. The business broker, however, does not fit that mold. In contrast to the activities of a real estate broker, the business broker's activities are usually an integral part of a total investment service oriented toward acquiring financing for large developments and transactions. Sometimes, in the course of this service, the business broker may bring parties together for the purpose of transferring a business as a going concern. In these circumstances, the business transaction might take the form of a transfer of controlling stock or an outright sale of all the assets. To take time out from his business to comply with the statutory time period for employment as a real estate sales associate would be devastating to the broker's business, as well as pointless in terms of protecting the public.

15. See note 4 *supra*.

16. 1922 N.Y. Laws, ch. 672, § 442-e (current version in N.Y. REAL PROP. LAW § 442-e (McKinney 1968)).

who neither intended nor realized himself to be involved in "criminal" activities. Accordingly, the court in *Weingast* concluded: "As failure to procure a real estate broker's license is made a crime, the statute must not be extended by implication."¹⁷

Absent specific statutory language clearly establishing the legislative intent behind the law, a court must look to policy considerations for guidance in construing a particular real estate licensing statute. Where a statute is as imprecise as that in New York, these policy arguments are significant factors in the judicial determination of its scope.

Since the *Weingast* decision in 1926, the New York statutory definition has not been changed so as to alter its scope concerning business brokers. As a result, the New York courts have developed a test whereby the business broker transaction is analyzed in order to determine whether the real estate involved is a dominant or merely incidental feature of the transaction.¹⁸ If only incidental, the broker need not be licensed under the statute. In other states which previously followed the *Weingast* rule,¹⁹ however, recent statutory amendments have either expressly defined a real estate broker as a business broker²⁰

17. 243 N.Y. at 116-17, 152 N.E. at 694.

18. See *Dodge v. Richmond*, 173 N.Y.S.2d 786, 788 (Sup. Ct. 1958) where the court, citing *Weingast*, stated:

The [*Weingast*] Court's language establishes that one looks to the nature of the transaction as well as the purpose of the statute.

If an item of real estate, or an interest in real estate, is a mere incident or incidental feature of the transaction obviously the statute should not apply. . . .

And this is true even though such item may be a significant though not a dominant feature of the transaction.

See also *Myer v. Jova Brick Works, Inc.*, 326 N.Y.S.2d 321, 324 (Sup. Ct. 1971).

19. See note 3 *supra*.

20. In the Colorado case of *Cary v. Borden Co.*, 153 Colo. 344, 386 P.2d 585 (1963) the plaintiff business broker sued for services rendered in assisting the defendant in the purchase of a dairy. The court applied the "dominant feature" concept, stating:

As we view it, the fact that realty, if separately considered, would fall within the descriptive words of the statute, cannot justify the isolation of it for the purpose of treating it as the subject of a separate sale; the realty must be regarded as constituting an essential part of an exceptional and unitary subject-matter of sale—the sale of a going concern in which the realty involved was "not a dominant feature." We will not extend the statute by implication so as to make the conduct of . . . [the plaintiff] criminal.

Id. at —, 386 P.2d at 587. The court was construing 1929 Colo. Sess. Laws, ch. 149, § 2 p.527 as amended 1965 Colo. Sess. Laws, ch. 238, § 117-1-2, p.934 (current version at COLO. REV. STAT. ANN. § 12-61-101 (1973)). The 1929 statutory definition was very similar to that of the New York statute construed in *Weingast*. See note 6 *supra*. In response to the *Cary* decision, the Colorado legislature in 1965 revised the statutory definition of a real estate broker to read in pertinent part:

"Real estate broker" . . . means any person . . . who . . . engages in or offers or attempts to engage in, either directly or indirectly, by a continuing course of conduct or by any single act or transaction, any of the following

or have included the *activities* of a business broker within the definition of a real estate broker.²¹

The Majority Rule

The majority rule has consistently held that if any real estate at all is involved in the transaction, the business broker must be licensed under the appropriate real estate licensing code. The leading case representing this view is *Kenney v. Paterson Milk & Cream Co., Inc.*,²² a

acts:

. . . . (j) Negotiating or attempting or offering to negotiate the listing, sale, purchase, exchange, or lease of a *business or business opportunity or the goodwill thereof* or any interest therein when such act or transaction involves, directly or indirectly, any change in the ownership or interest in real estate, or in a leasehold interest or estate, *or in a business or business opportunity which owns an interest in real estate or in a leasehold.*

(emphasis added). Later amendments to the code have not changed the language of the above provision.

21. In *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415 (1959) the court held that the business broker was not within the purview of the statutory definition of 1931 Ark. Acts, no. 142, § 2, p.380 (current version at ARK. STAT. ANN. § 71-1302 (Supp. 1975)). The court stated:

The Arkansas statute is Act 148 of 1929 [original statute]. The Supreme Court of Michigan had decided in 1923 the case of *Miller v. Stevens*, 224 Mich. 626, 195 N.W. 481, in which was involved a Michigan statute which regulated not only real estate brokers, but "business chance brokers". Since the definition of real estate broker in the Arkansas statute is very similar to the Michigan statute, and since "business chance brokers" are not within the purview of the Arkansas statute, we are driven to the conclusion that it was not the purpose of the Arkansas statute to regulate any form of brokers except real estate brokers.

230 Ark. at —, 323 S.W.2d 415, 419-20 n.4. The Arkansas statute, amended in 1975, now reads in pertinent part:

A real estate broker . . . means an individual . . . who . . . (j) assists or directs in the negotiation of *any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate.* . . .

. . . . Any person who . . . [performs] any single act described in this subsection, whether as a part of a transaction, or as an entire transaction, shall be deemed a broker or salesman within the meaning of this Act

ARK. STAT. ANN. § 71-1302 (Supp. 1975) (emphasis added).

Arguably, the 1959 Arkansas Supreme Court decision in *Frier* could be read to require the licensing statute to *expressly* include business brokers in its language in order to regulate them. If this is the case, the *Frier* decision might still be good law in Arkansas, notwithstanding the 1975 statutory amendments to the licensing statute. However, the language of the amended statute is relatively explicit in describing the *activities* of a business broker.

22. 110 N.J.L. 141, 164 A. 274 (1933). Other jurisdictions often cited as following the majority rule are: California, *Abrams v. Guston*, 110 Cal. App. 2d 556, 243 P.2d 109 (1952); Kansas, *Thomas v. Jarvis*, 213 Kan. 671, 518 P.2d 532 (1974); Ohio, *De Metre v. Savas*, 93 Ohio App. 367, 113 N.E.2d 902 (1953); Texas, *Hall v. Hard*, 160 Tex. 565, 335 S.W.2d 584 (1960); *Breeding v. Anderson*, 152 Tex. 92, 254 S.W.2d 377 (1953); Washington, *Grammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 P. 376 (1931).

New Jersey case involving a business broker who sued to recover a commission for the sale of a milk business. In holding that the business broker must be licensed, the court looked to the New Jersey statute²³ and found a more precise delineation of its scope than the New York statute construed in *Weingast*. The court noted: "The [New York] statute . . . appears to differ from the New Jersey statute . . . in that nothing is said [in the New York statute] about a single sale or transaction being unlawful."²⁴ In this manner the New Jersey court distinguished *Weingast*, avoiding a policy discussion by finding it unnecessary to look beyond the face of the statute to policy considerations.

The New Jersey court also emphasized that while the *Weingast* decision concerned only a lease of real property, *Kenney* involved the actual transfer of title to real estate.²⁵ The court apparently based this decision on the fact that since the New York licensing statute had no "single act, transaction or sale" provision, the New York court in *Weingast* was free to find that a lease, as an incident to the sale of an ongoing business, was insufficient to include the transaction within the purview of the statute. The strained logic in *Kenney* is evidence of the fact that the New Jersey court was avoiding the policy considerations which formed the real basis of the *Weingast* decision.

Whatever the validity of the distinction perceived by the New Jersey court in *Kenney*, the decision rested on the additional specificity found in the New Jersey statutory definition of a real estate broker.²⁶ This element of additional specificity in various statutory forms seems to be the common denominator in cases adhering to the majority rule.²⁷

23. 1931 N.J. Laws, ch. 159, § 1, p.300 (current version at N.J. STAT. ANN. § 45:15-3 (1963)). Although the New Jersey statutory definition was originally similar to that in New York, *supra* note 6, the New Jersey legislature added specificity to that definition in another section of its real estate code. See note 24 *infra*.

24. *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, —, 164 A. 274, 276 (1933), referring to N.J. STAT. ANN. § 45:15-2 (1963), which reads: "Any single act, transaction or sale shall constitute engaging in business within the meaning of this article."

25. 110 N.J.L. at —, 164 A. at 276.

26. It should be emphasized that New Jersey shored up its statutory definition by amending it in 1953 to read in pertinent part: "A real estate broker . . . is defined to be a person . . . who . . . assists or directs in the . . . negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate . . ." N.J. STAT. ANN. § 45:15-3 (1963).

27. In the most recent case following the majority rule, *Thomas v. Jarvis*, 213 Kan. 671, 518 P.2d 532 (1974) the Kansas Supreme Court held that the Kansas statutory definition of a real estate broker more specifically defined the scope of the licensing statute and therefore could be distinguished from the statutes in minority rule jurisdictions. *Id.* at —, 518 P.2d at 536. The plaintiff in *Jarvis* was a specialist "in the

The Range of Statutory Specificity

An increasing number of states now follow the majority rule, representing a national trend toward more specific and, consequently, inclusive real estate licensing legislation. This means that fewer courts will be confronted with the policy considerations discussed by the *Weingast* court in construing the New York statute. Various states have employed one or more of three basic types of clauses which give the definition of a real estate broker greater specificity vis-a-vis business brokers than the New York-type statute.²⁸ These clauses, which may

field of corporate mergers and acquisitions" who had negotiated the sale of three corporations controlled by the defendants. On the basis of the foregoing statutory distinction, the court ruled that the business broker must be licensed under the statute. *Id.* at —, 518 P.2d at 536, *construing* KAN. STAT. ANN. § 58-3002 (Supp. 1975). See *De Metre v. Savas*, 93 Ohio App. 367, 113 N.E.2d 902 (1953); *Divito v. Buckeye Union Gas Co.*, 174 Ohio St. 301, 189 N.E.2d 57 (1963).

Two cases, *Grammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 P. 376 (1931) and *Abrams v. Guston*, 110 Cal. App. 2d 556, 243 P.2d 109 (1952), although not directly dealing with the issue of whether a business broker's activities fall within their respective licensing statutes, are nevertheless often cited as majority rule cases. See *Cary v. Borden Co.*, 153 Colo. 354, —, 386 P.2d 585, 587 (1963); *Thomas v. Jarvis*, 213 Kan. 671, —, 518 P.2d 532, 536 (1974). In both cases the theory advanced to avoid licensing requirements was that the plaintiffs were not brokers, but rather "middlemen" or "advisers." Both courts held that since the plaintiffs were engaged in activities amounting to "negotiation," they were acting as real estate brokers and therefore must be licensed. 110 Cal. App. 2d at —, 243 P.2d at 110; 162 Wash. at —, 299 P. at 379. Interestingly, the legislatures in both states subsequently amended their statutory definitions to expressly include business brokers. See CAL. BUS. & PROF. CODE § 10131 (West Supp. 1976); WASH. REV. CODE ANN. § 18.85.010 (Supp. 1975).

Finally, there is a group of cases which allow the business broker to recover only for that portion of the transaction which is personal property. See *Abramson v. Gulf Coast Jewelry & Specialty Co.*, 445 F.2d 802 (5th Cir. 1971); *Marks v. Walter G. McCarty Corp.*, 33 Cal. 2d 814, 205 P.2d 1025 (1949); *Moreland v. Kilgore*, 83 Ga. App. 606, 64 S.E.2d 295 (1951); *Quick Shops of Miss., Inc. v. Bruce*, 232 So. 2d 351 (Miss. 1970). The severance concept is of limited utility, however, since the courts generally allow this type of recovery only when the real and personal property are in separate transactions. See *Democa v. Barasch*, 212 Cal. 293, —, 298 P. 17, 19 (1931); *Abrams v. Guston*, 110 Cal. App. 2d 556, —, 243 P.2d 109, 110 (Ct. App. 1952); *Manning v. North Texas Producers Assoc.*, 370 S.W.2d 939, 941 (Tex. Civ. App. 1963). But see *Abramson v. Gulf Coast Jewelry & Specialty Co.*, 445 F.2d 802, 803 (5th Cir. 1971); *Marks v. Walter G. McCarty Corp.*, 33 Cal. 2d 814, —, 205 P.2d 1025, 1030 (1949); *Quick Shops of Miss., Inc. v. Bruce*, 232 So. 2d 351, 354 (Miss. 1970). Nevertheless, the severance concept could represent a good compromise for courts to adopt. The harsh inequity of depriving the business broker of his entire fee in transactions involving an interest in real estate could be avoided by prohibiting recovery merely for that portion of the transaction representing real property. Unless it is legislatively adopted, however, the severance concept would not necessarily remedy the problem of lack of notice as to what a vague licensing statute requires. See HAWAII REV. STAT. § 467-1 (1968), which provides that a business broker's activities are regulated *only* to the extent of any real estate in the transaction.

28. This can be accomplished either by a more specific statutory definition or by additional sections which, when read with the statutory definition, are more inclusive. See notes 23 and 24 *supra*.

be employed in various forms and in combination with one another, will be briefly discussed in the order of their specificity.

A growing number of states have expressly defined one of the activities of a real estate broker as that of a "business opportunity broker."²⁹ At least one state statute defines "business opportunity" to include "business, business opportunity and good will of an existing business or any one or combination thereof."³⁰ Under the terms of this clause, the business broker will be regulated by the licensing statute regardless of whether an interest in real estate is involved in the business transaction.

Other states have included within the scope of their real estate broker definitions "the negotiation or closing of any transaction which does or is calculated to result in the sale . . . of any real estate."³¹ This provision describes the activities of business brokers sufficiently for the courts to find a legislative intent to regulate them. Indeed, the only state court to litigate the issue in a state with this type of statutory provision found a business broker to be within the definition.³²

A third type of clause typically supplements the statutory definition of a real estate broker and provides that "[a]ny single act, transaction or sale [meaning those within the definition] shall constitute engaging in business within the meaning of [the real estate code]."³³ This type

29. See note 18 *supra*. Fifteen states and the District of Columbia have such provisions: CAL. BUS. & PROF. CODE § 10131 (West Supp. 1976); COLO. REV. STAT. ANN. § 12-61-101 (1973); D.C. CODE ENCYCL. ANN. § 45-1402 (1968); HAWAII REV. STAT. § 467-1 (1968); IDAHO CODE § 54-2022 (Supp. 1976); IND. ANN. STAT. § 25-34-1-23 (Burns 1973); LA. REV. STAT. ANN. § 37:1431 (1974); MICH. COMP. LAWS ANN. § 451.202 (Supp. 1976-77); MINN. STAT. ANN. § 82.17 (Supp. 1976); NEV. REV. STAT. § 645.030 (1975); OHIO REV. CODE ANN. § 4735.01 (Baldwin 1975); ORE. REV. STAT. § 696.610 (1975); S.D. COMP. LAWS ANN. § 36-21-1.1 (Supp. 1976); UTAH CODE ANN. § 61-2-2 (1968); WASH. REV. CODE ANN. § 18.85.010 (Supp. 1975); WIS. STAT. ANN. § 452.01 (1974).

30. WASH. REV. CODE ANN. § 18.85.010(5) (Supp. 1975).

31. ALAS. STAT. § 08.88.161 (Supp. 1975); ARK. STAT. ANN. § 71-1302 (Supp. 1975); ARIZ. REV. STAT. ANN. § 32-2101 (Supp. 1975); FLA. STAT. ANN. § 475.01 (1965); IDAHO CODE § 54-2022 (Supp. 1976); IND. ANN. STAT. § 25-34-1-23 (Burns 1973); KAN. STAT. ANN. § 59-3002 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 112, § 89 (Supp. 1976); NEB. REV. STAT. § 81-867 (1971); N.J. STAT. ANN. § 45:15-3 (1963); ORE. REV. STAT. § 696.020 (1975); R.I. GEN. LAWS ANN. § 5-20.5-1 (Supp. 1975); UTAH CODE ANN. § 61-2-2 (1968); W. VA. CODE ANN. § 47-12-2 (1976).

32. See *Thomas v. Jarvis*, 213 Kan. 671, 518 P.2d 532 (1974).

33. N.J. STAT. ANN. § 45:15-2 (1963). Eighteen other states and the District of Columbia have such provisions. See, e.g., COLO. REV. STAT. ANN. § 12-61-101 (1973); D.C. CODE ENCYCL. ANN. § 45-1402 (1968); KY. REV. STAT. ANN. § 324.010 (Supp. 1976); MISS. CODE ANN. § 73-35-3 (Supp. 1975); PA. STAT. ANN. tit. 63, § 432 (1968); TENN. CODE ANN. § 62-1304 (Supp. 1975); W. VA. CODE ANN. § 47-12-2 (1976).

of provision is not aimed specifically at business brokers but, when used in conjunction with the other clauses previously mentioned, has a cumulative effect which is detrimental to them. The provision is more properly aimed at persons seeking to escape the requirements of the licensing statute by arguing that it was intended to regulate only professional real estate brokers and not a person who happens to negotiate or close a single, isolated real estate transaction.³⁴ Even standing alone, the broad import of this type of provision at least partially neutralizes the business broker's argument that he is not engaged in the business of a real estate broker and that a particular business transaction only incidentally involves a transfer or sale of real estate.

A variation of the above clause provides that any person who performs "a single act . . . as a part of a transaction, or as an entire transaction, is deemed to be acting as a real estate broker."³⁵ In addition to extending licensing requirements to persons not involved in the real estate profession, this provision further negates the business broker's argument that the real estate comprises only a quantitatively small portion of the entire transaction.

A few states have both an "any single act or transaction" provision and an "any transaction calculated to result" clause,³⁶ while others combine a "business opportunity broker" clause with either of the above.³⁷ Although only one state combines all three,³⁸ a substantial majority of jurisdictions have at least one of these provisions.³⁹

The Oklahoma Statute, Although Rewritten in 1974, Remains Vague

The Oklahoma Real Estate Licensing Code was rewritten in

North Dakota is unique in expressly providing that a single or isolated transaction does *not* constitute doing business as a real estate broker within the code. N.D. CENT. CODE § 43-23-010 (Supp. 1975).

34. See *Tanenbaum v. Sylvan Builders*, 29 N.J. 63, 148 A.2d 176 (1959); *Breeding v. Anderson*, 152 Tex. 92, 254 S.W.2d 377 (1953); *Owens v. Capri*, 65 Wyo. 325, 202 P.2d 174 (1949).

35. See, e.g., ARK. STAT. ANN. § 71-1302 (Supp. 1975); MD. ANN. CODE art. 56, § 212 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6573a, § 4 (Supp. 1976-77); WYO. STAT. ANN. § 33-355.4 (Supp. 1975).

36. ARK. STAT. ANN. § 71-1302 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 112, § 89 (Supp. 1976); N.J. STAT. ANN. §§ 45:15-2, 45:15-3 (1963); ORE. REV. STAT. §§ 696.010, 696.040 (1975); W. VA. CODE ANN. § 47-12-2 (1976).

37. COLO. REV. STAT. ANN. § 12-61-101 (1973); D.C. CODE ENCYCL. ANN. § 45-1402 (1968); IDAHO CODE §§ 54-2022, 54-2023 (Supp. 1976); IND. ANN. STAT. § 25-34-1-23 (Burns 1973); S.D. COMP. LAWS ANN. §§ 36-21-1 to -21-1.2 (Supp. 1976); UTAH CODE ANN. § 61-2-2 (1968).

38. ORE. REV. STAT. §§ 696.010, 696.040, 696.610 (1975).

39. Thirty-eight states and the District of Columbia have at least one of these provisions. See notes 29-31, 33, 35-38 *supra*.

1974,⁴⁰ but the statutory definition of a real estate broker remains among the least specific in the nation.⁴¹ None of the more specific statutory provisions previously discussed are found in the Oklahoma definition of a real estate broker. In this respect, the Oklahoma statute is similar to the New York statute, thereby making the *Weingast* decision rather persuasive in Oklahoma. At the very least, therefore, resolution of the business broker issue in Oklahoma should depend on an analysis of the probable intent of the legislature in enacting the licensing statute. This analysis, moreover, should be complemented by a consideration of the policies which generally underlie real estate regulatory legislation.⁴²

Since there is no published legislative history in Oklahoma, the determination of whether the legislature intended the real estate code to include business brokers is actually an exercise in logic. Hence, the fact that the Oklahoma code was so recently revised, with the statutory definition of a real estate broker left relatively unchanged,⁴³ becomes critical in assessing the business broker's status under the licensing statute. Framed in these terms, the vague statutory language in the Oklahoma

40. OKLA. STAT. ANN. tit. 59, §§ 858-101 to -501 (Supp. 1976).

41. See OKLA. STAT. ANN. tit. 59, § 858.102(2) (Supp. 1976) which states:

The term "real estate broker" shall include any person . . . who for a fee, commission or other valuable consideration . . . lists, sells or offers to sell, buys or offers to buy, exchanges, rents or leases any real estate, or who negotiates or attempts to negotiate any such activity, or solicits listings of places for rent, or solicits for prospective tenants, or who advertises or holds himself out as engaged in such activities.

Compare the New York statutory definition at note 6 *supra*. Other states with vague and noninclusive statutory definitions are: ALA. CODE tit. 46, § 311(3) (Supp. 1973); DEL. CODE ANN. tit. 24, § 2901 (1974); CONN. GEN. STAT. ANN. § 20-311 (Supp. 1976); MO. ANN. STAT. § 339.010 (Vernon Supp. 1976); MONT. REV. CODES ANN. § 66.1925 (Supp. 1975); N.H. REV. STAT. ANN. § 331A:1 (Supp. 1975); N.C. GEN. STAT. § 93A-2 (Supp. 1975); N.D. CENT. CODE § 43-23-06 (1960); S.C. CODE ANN. § 56-1545.1:1 (Supp. 1974); VT. STAT. ANN. tit. 26, § 2211 (1975).

42. One must assume a hypothetical situation in which the real estate involved in the transaction is not the "dominant feature" thereof. Otherwise, the *Weingast* rationale would not apply. See note 18 *supra*. In addition, one must assume the existence of an otherwise valid and enforceable contract. Thus the issue raised is whether a defendant-client, raising as a defense the real estate code requirement of a license, may avoid performance (paying plaintiff-broker's commission) under an otherwise valid brokerage contract.

43. The previous Oklahoma statutory definition read:

The term "real estate broker" within the meaning of this Act, shall include all persons . . . who for a fee, commission, or other valuable consideration . . . lists, sells, purchases, exchanges, rents or leases any real estate, or the improvements thereon, including options, or who negotiates or attempts to negotiate any such activity; or who advertises or holds himself, itself or themselves out as engaged in such activities.

Law of May 20, 1953, tit. 59, § 858-102(2) (current version at OKLA. STAT. tit. 59, § 858-102(2) (Supp. 1976)).

code suggests two possible conclusions about legislative intent: (1) the Oklahoma legislature did not even consider the business broker or the possible application of the statute to him, or (2) the vague statutory language represents an implicit statement of legislative intent *not* to include the business broker within the licensing statute.

It seems likely that the first conclusion is correct; apparently the Oklahoma legislature did not consider the business broker when revising the statute. Empirical data is not necessary to safely conclude that the number of businesses sold as going concerns under the direction of brokers is relatively small in comparison to the total number of real estate transactions in any given area or time period. Even though there has been a significant amount of litigation nationally concerning business brokers, the issue is simply not of great public concern. Since there has been no litigation in Oklahoma, it is not unreasonable to conclude that the legislature simply had no occasion to consider the problem or look to other states for guidance.

Nevertheless, the argument can be persuasively made that the statute represents an implicit statement of the Oklahoma legislature's position on the issue—that the statutory language remains vague by design rather than neglect. Considering the litigation in other jurisdictions, and the national trend toward more explicit and inclusive statutory language, it would seem that the legislature, in undertaking a complete revision of the code, would research developments elsewhere for guidance in resolving the business broker issue in Oklahoma. Therefore, the vague statutory language may well constitute an implicit statement that the statute was not intended to apply to a business broker.

Because of the difficulties in discerning the original intent of the legislature in drafting the licensing statute, Oklahoma courts should consider the similar lack of specificity in the language of the New York statute and the resulting *Weingast* minority rule.⁴⁴ In this regard, the courts should examine the various policy considerations previously discussed⁴⁵ in order to accurately determine the scope which the drafters *intended* to give the Oklahoma licensing statute. These considerations should include recognition of the fact that business brokers are not necessarily within the class at which regulatory real estate licensing legislation was originally aimed, since they usually deal in arms-length transactions with other business professionals. It should also be noted

44. See notes 3-7 *supra* and accompanying text.

45. See notes 8-17 *supra* and accompanying text.

that business brokers do not advertise or hold themselves out to be real estate brokers; thus, it would be inequitable to allow a statutory technicality to be used to deny a business broker his fairly earned fee in transactions involving small and incidental interests in real estate.⁴⁶ Finally, courts should keep in mind that the real estate code carries penal sanctions⁴⁷ and thus must be strictly construed.⁴⁸

Despite the strength of the *Weingast* rule in the context of the Oklahoma Real Estate Licensing Code, Oklahoma courts may reason that in light of the national trend toward more inclusive real estate licensing codes, the Oklahoma statute should be construed to encompass a business broker's activities. Any decision in this regard would undoubtedly focus on the experience of other jurisdictions that originally followed *Weingast* only to have their legislatures amend the statutory language to include business brokers.⁴⁹ Perhaps out of a fear of being legislatively overruled, the Oklahoma courts might conclude that the general intent of the legislature was to place Oklahoma in line with a majority of other jurisdictions.

On the other hand, a more reasonable conclusion is that business brokers simply should not be judicially included within the scope of the current Oklahoma licensing statute. The drafters of the 1974 revision of the real estate code could have easily incorporated more specific and inclusive statutory language had they intended to reach the business broker. Their failure to do so has resulted in a situation in which business brokers in Oklahoma are unable to ascertain whether they should be licensed as real estate brokers before engaging in certain transactions. To avoid many of the problems inherent in applying an ambiguous licensing code to business brokers, the Oklahoma courts should refuse to reform the statute by judicial fiat and instead await legislative clarification.

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46. See notes 13-15 *supra* and accompanying text.

47. See OKLA. STAT. ANN. tit. 59, § 858-401 (Supp. 1976).

48. See, e.g., *Matthews v. Powers*, 425 P.2d 479 (Okla. 1967); *Simpson v. State*, 267 P.2d 1008 (Okla. 1954); *Group v. State*, 94 Okla. Cr. 401, 236 P.2d 997 (1951).

49. See notes 19-21 *supra* and accompanying text.