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# COLORADO "BUYER BROKERAGE": DOES IT STILL EXIST AFTER *VELTEN v. ROBERTSON*?

ROBERT G. NATELSON

## I. BUYER BROKERAGE

Traditionally, the role of the real estate broker in a real estate sale or leasing transaction has been to represent the seller.<sup>1</sup> The agreement under which the seller and broker mutually consent to this agency is a "listing agreement."<sup>2</sup> In some states, the local statute of frauds requires that in order for a listing agreement to constitute an enforceable contract, it must be memorialized in a signed writing.<sup>3</sup> However, in most jurisdictions the common law rule is still in effect: an enforceable listing contract may be written, oral,<sup>4</sup> or implied by the circumstances.<sup>5</sup>

Under the terms of the typical listing agreement, a seller or landlord engages to pay to the broker a commission if the broker procures a purchaser or lessee ready, willing, and able to purchase or lease the seller's or landlord's property upon the terms and conditions specified in the listing agreement.<sup>6</sup> The commission payable is usually calculated on the basis of a fixed percentage of the sales price or rent.

Despite the usual role of the real estate broker as an agent for the property owner, it has also been recognized that a broker may quite properly act as an agent for a prospective property purchaser. In such a situation, the broker's usual task is to procure for his buyer a property that meets the latter's specifications.<sup>7</sup> While hitherto bro-

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1. *Janes v. CPR Corp.*, 623 S.W.2d 733, 740 (Tex. Civ. App. 1981), *reh'g denied*.

2. *Leiter v. Fleetwood Realty Corp.*, 95 Ill. App.3d 212, 419 N.E.2d 519 (1981).

3. *E.g.*, in *Indiana, Texas, and Idaho. Century 21 Quality Properties, Inc. v. Chandler*, 103 Idaho 193, 646 P.2d 435 (Id. Ct. App. 1982); *Gerardot v. Emenhiser*, 173 Ind. App. 353, 363 N.E.2d 1072 (1977); *Janes v. CPR Corp.*, 623 S.W.2d 733 (Tex. Civ. App. 1981).

4. *Consolidated Oil & Gas, Inc. v. Roberts*, 162 Colo. 149, 425 P.2d 282 (1967); *Osborn v. Razatos Realty Co.*, 158 Colo. 446, 407 P.2d 342 (1965).

5. A few of the many cases on this point include *Fletcher v. Garrett*, 167 Colo. 60, 445 P.2d 401 (1968); *Klipfel v. Bowes*, 108 Colo. 583, 120 P.2d 959 (1942); *Bennett v. H.K. Porter Co.*, 13 Ill. App.3d 528, 301 N.E.2d 155 (1973); *Weinberg v. Dessler*, 243 Md. 347, 221 A.2d 66 (1966); *Wills v. Alcorn*, 636 S.W.2d 142 (Mo. Ct. App. 1982); *Janes v. CPR Corp.*, 623 S.W.2d 733 (Tex. Civ. App. 1981).

6. *See Fletcher v. Garrett*, 167 Colo. 60, 445 P.2d 401 (1968).

7. *Lester v. Marshall*, 143 Colo. 189, 352 P.2d 786 (1960); *Kurtz v. Farrington*, 104

ker representation of purchasers has been more common in other fields of brokerage,<sup>8</sup> there has been a growing interest in the real estate profession in the possibility of increased representation of buyers.<sup>9</sup> The term generally used to denote such representation is "buyer brokerage."

There is as yet no universal acceptance of the exact scope of the term "buyer brokerage." It is clear that a "buyer's broker" is one who searches for acceptable properties for a prospective purchaser and guides him through the intricacies of the sales transaction. Beyond that restrictive usage, the term has been applied to any of the following situations:

(1) The broker locates a property for the buyer by using the services of a Multiple Listing System (MLS), negotiates with the listing agent, and is paid a share of the commission due from the seller to the listing agent.

(2) Identical to (1), except that an MLS is not employed.

(3) The broker locates a property for the buyer, negotiates directly with the unrepresented seller, and is paid a commission directly by the buyer.

(4) Identical to (3), except that the seller is represented by another broker.

As one can see, the potential identification of the "buyer's broker" with the interests of the seller declines as one moves down the list. Some real estate professionals would employ the term "buyer brokerage" to include only Situations (3) and (4), that is, where the purchaser pays a commission directly to his broker. However, the term is occasionally applied to all four situations, and at least one court decision can be cited in support of the term being utilized to describe Situation (2).<sup>10</sup>

Situations (1) and (2), where the seller's commission is split, are commonly called cooperative (or "co-op") arrangements. In such an arrangement the broker accepting the listing is denominated the "listing broker" and the one finding the buyer is called the "selling broker." To avoid confusion the latter will be uniformly designated herein by the phrase "buyer's broker."

Conn. 257, 132 A. 540 (1926); *Baskin v. Dam*, 4 Conn. Cir. Ct. 702, 239 A.2d 549 (1967); *Timmerman v. Ankrom*, 487 S.W.2d 567 (Mo. 1972).

8. *See, e.g., McCormick & Co. v. Tolmie Brothers*, 42 Idaho 1, 243 P. 355 (1926) (stockbroker representing buyer).

9. So much so that the Colorado Real Estate Commission is considering issuing a state-approved "buyer brokerage" contract form. At this writing, the form is in draft stage.

10. *See infra*, note 12.

The reader is encouraged to understand the structure of these four situations thoroughly before proceeding.

Inherent in the concept of "buyer brokerage" is the notion that a prospective purchaser should be able to employ a real estate agent to represent the purchaser's interests as opposed to those of the seller. The purchaser in Situation (1), for example, who asks a real estate broker to assist him in finding a property may think of the broker as "his broker," but in fact the broker is the agent or subagent of the seller and owes fiduciary duties to the seller. The rationale for this position appears to be that one who elects to attempt to sell property listed within an MLS system does so with the consent of the individual who placed the property in that system, and is paid by that individual.<sup>11</sup> Accordingly, to the extent the buyer's broker in Situation (1) attempts to represent the purchaser, he places himself into a conflict of interest.

While there is authority from an Arizona court that in Situation (2) the buyer's broker is the buyer's agent,<sup>12</sup> this is apparently not the rule in Colorado. The official Real Estate Manual of the Colorado Real Estate Commission (the state authority regulating real estate brokers and salesmen) states that when a listing broker consents to share his commission with a buyer's broker, "[t]he consent of the listing broker is by custom considered tantamount to an employment or subagency agreement to share in any commission due the listing broker."<sup>13</sup>

One may perhaps question the reasoning of this policy. The buyer's broker is likely to have a more substantial relationship to the prospective purchaser than to the seller. Also, one may question the Real Estate Commission's policy's compliance with existing case law, especially in light of the Arizona decision mentioned earlier.<sup>14</sup> Nevertheless, the Colorado Real Estate Commission certainly has the power to implement its understanding of agency relationships in the real estate industry,<sup>15</sup> and one must conclude therefore that the doctrine that the buyer's broker is the subagent of the seller in "cooperative" arrangements is, for practical purposes, the law in Colorado.

Whatever the status of the law in Situations (1) and (2), before

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11. *Chamberlain v. North Central Inv. Corp.*, 432 S.W.2d 581 (Tex. Civ. App. 1968), *reh'g denied*.

12. *Buffington v. Haas*, 124 Ariz. 36, 601 P.2d 1320 (1979).

13. STATE OF COLORADO, REAL ESTATE MANUAL pt. 3, at 6 (2d Printing, June 1, 1982).

14. *See supra* note 12.

15. *See generally* COLO. REV. STAT. §§ 12-61-101 to -122 (1978).

the 1983 Colorado Court of Appeals decision in *Velten v. Robertson*,<sup>16</sup> it seemed probable that the buyer's broker in Situations (3) and (4) represented solely the interests of the buyer. Certainly that was the holding of the bulk of applicable case law. The decision in *Velten*, however, substantially upset that assumption, and raised serious questions as to whether a commissioned real estate broker in Colorado could ever exclusively represent a buyer.

## II. DECISION IN *Velten v. Robertson*

Velten arose in a "Situation (3)" setting. According to the facts as set forth by the Court of Appeals, Ms. Robertson was the owner of an apartment building in Jefferson County, Colorado. In 1979 she was contacted by one Zimmerman, a sales agent for Woodside Realty, who inquired as to whether she would be interested in selling her property. Zimmerman apparently was aware that Brady and Velten, the prospective purchasers, were in the market for good investment property.

Ms. Robertson indicated that she might want to sell, but refused Zimmerman's request for an exclusive listing on the property. There is no indication as to whether a non-exclusive listing was suggested, but seemingly none was given.

Zimmerman nevertheless suggested to the buyers that they make an offer to purchase Ms. Robertson's real estate. They agreed, and signed a proposal prepared by Zimmerman. He carried it to the seller's home. She raised several objections, but signed the offer, thereby converting it into a contract. Two days later the parties also signed an addendum modifying the contract to meet Ms. Robertson's stated objections.

In the course of these negotiations, the broker and buyers agreed that the buyers would take sole responsibility for paying the broker's commission. This was understood by Ms. Robertson, however, the exact nature of the commission arrangement was not disclosed to her. Under that arrangement, the buyers were to execute a note payable to the salesman in the amount of \$5,000, secured by a deed of trust on the property. The deed of trust would be attached to the building when it was transferred to the purchasers. Moreover, if the property were to be sold in the following year, the salesman would be entitled to fifty percent of the buyers' profits.

Sometime after the contract was signed, Ms. Robertson an-

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16. 671 P.2d 1011 (Colo. Ct. App. 1983).

nounced her refusal to convey the building to the purchasers. Accordingly, both they and the broker sued her for specific performance.

The salesman's action in taking a personal interest in the property without informing the seller probably violated a provision of Colorado law which empowers the Colorado Real Estate Commission to censure, suspend, or revoke the license of any real estate agent for "claiming, arranging for, or taking any secret or undisclosed amount of compensation, commission, or profit *or* failing to reveal to his principal or employer the full amount of such licensee's compensation, commission, or profit. . . ." (Emphasis added.)<sup>17</sup>

Note that the part of this provision before the disjunctive "or" implies disclosure to be necessary to all parties in the transaction, even those who are not principals of the broker.<sup>18</sup>

Perhaps surprisingly, the court did not refer to this provision in rendering its decision denying specific performance. Instead, it employed a theory of agency to deny the broker his commission and to refuse enforcement of the sale to the purchasers.

Although the trial court had found the broker to be the agent of the buyers but not of the seller, the Court of Appeals reversed the latter finding. To the contrary, it held that the salesman (and therefore Woodside Realty, his employing company) was also an agent of the seller as a matter of law. In the course of its discussion, the court mentioned that the salesman had contacted the owner, told her he had a buyer, prepared the contract, and procured the signatures of the parties. Two of these factors were apparently deemed sufficient, since uncontradicted, to establish agency with the seller as a matter of law: (a) that the salesman had contacted the seller, and (b) that he had obtained the signatures of both the buyers and the seller.

While the court acknowledged that the broker's commission was to be paid exclusively by the purchasers, it did not deem that fact to be as important as the combined weight of factors (a) and (b), above. "[T]he establishment of an agency relationship," ruled the court, "does not stand or fall on a determination of whether a commission was to be paid."<sup>19</sup>

Once the court had found seller-broker agency, a fiduciary rela-

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17. COLO. REV. STAT. § 12-61-113(q) (1978).

18. While the Commission has not issued an explicit interpretation of this section, a review of Commission Rule E would seem to support the interpretation suggested herein. See REAL ESTATE COMM'N RULES 4 C.C.R. 725-1, Rules E(5)(b), (18), and (19) (1983).

19. 671 P.2d at 1012.

tionship followed. The court then described the salesman's non-disclosure as a breach of that fiduciary relationship.<sup>20</sup> The next step was to impute this breach to the buyers themselves, and therefore to deny them specific performance. There is no indication in the case that a cause of action for damages had been stated, or whether, if it had, it was a subject of the appeal.

### III. ISSUES IN *Velten* RELATING TO BUYER BROKERAGE

There are essentially two issues arising out of the decision in *Velten* that have significant implications for the future of "buyer brokerage." The first of these is the court's ruling that the salesman had acted as an agent for the seller as well as for the buyers. The second issue is the decision of the court in denying specific performance to the buyers because of the broker's non-disclosure. Each of these will be discussed in detail.

#### A. *The Agency Ruling*

As noted above, the *Velten* court held that the broker was, as a matter of law, the agent of the seller because he (1) had contacted the seller, and (2) had obtained both her signature and those of the buyers upon the contract of sale. While conceding that the broker was to be paid by the purchasers, the court ruled that the source of compensation was not controlling on the question of agency, and cited the Colorado Court of Appeals case of *Hickam v. Colorado Real Estate Commission* as support.<sup>21</sup>

*Hickam* was a real estate broker who had been disciplined by the Real Estate Commission for, *inter alia*, unduly favoring one prospective purchaser over another to the detriment of his own seller-principal. In affirming the action of the Commission, the *Hickam* court quite properly brushed aside the appellant's protestations that he was not being compensated by the favored purchaser. It pointed out that one can represent the interests of a party, to the detriment of one's own principal, without receiving compensation for such representation.<sup>22</sup>

The *Hickam* case arose out of circumstances somewhat different from those found by the Court of Appeals in *Velten*, since in

20. The existence of a fiduciary relationship between broker and principal is, of course, unquestionable, *M.S.R., Inc. v. Lish*, 34 Colo. App. 320, 527 P.2d 912 (1974), as is the duty of disclosure to a principal. *Williams v. Wagers*, 117 Colo. 141, 184 P.2d 497 (1947). *See also* *Janes v. CPR Corp.*, 623 S.W.2d 733 (Tex. Civ. App. 1981).

21. 36 Colo. App. 76, 534 P.2d 1220 (1975).

22. *Id.* at 82, 534 P.2d at 1224.

*Hickam* the broker's sole principal was also his sole source of compensation. However, there are a number of cases which, on closer facts, do agree with the *Velten* court that compensation is not determinative of an agency relationship.<sup>23</sup>

Yet although agency does not (in the court's words) "stand or fall" upon compensation, it is nonetheless true that compensation is one factor, and an important one, in determining the existence of an agency relationship. In real estate brokerage, as in most other kinds, "[a] broker . . . is ordinarily the agent of the person who pays him."<sup>24</sup>

The court in *Velten* evidently decided, therefore, that the two other factors of (a) contacting the seller, and (b) obtaining the parties' signatures, were sufficient indications of agency to override the fact that the seller paid the broker nothing.

The other major authority cited in *Velten* to support the ruling that the broker was the agent of the seller was *M.S.R., Inc. v. Lish*.<sup>25</sup> According to the *Velten* decision, the conditions in *Lish* were similar to those in *Velten* (except that in *Lish* the seller was to pay a commission), and just as *Lish* concluded that an agency relationship existed between seller and broker, the same was true in *Velten*.

Examination of *Lish*, however, reveals that the case may have been not so much one of actual agency, as of estoppel. Ms. Lish, the property owner, was approached by a salesman and asked if she wished to sell her property. The salesman (Regan) affirmed that he had a buyer for her, and she consented to sell. She then signed a contract of sale under which she also agreed to pay the salesman's broker a ten percent commission. As it turned out, the buyer, M.S.R., Inc., was a corporation controlled by the salesman himself together with the principal of his employing broker (Mansfield). This fact was not revealed to Ms. Lish.

The seller soon repudiated the contract with M.S.R., Inc., and the corporation proceeded to sue her for specific performance. On appeal, the seller was permitted to rescind on grounds of breach of fiduciary duty. The reasoning of the court was as follows:

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23. *E.g.*, *Kurtz v. Farrington*, 104 Conn. 257, 132 A. 540 (1926); *Jones v. Herr*, 39 Or. App. 937, 594 P.2d 410 (1979); *The Continental Bank and Trust Co. v. Taylor*, 14 Utah 2d 370, 384 P.2d 796 (1963).

24. *Nix v. Dunavant*, 249 Ark. 641, 460 S.W.2d 762, 764 (1970). *See also* *Coons v. Gunn*, 263 Cal. App. 2d 594, 69 Cal. Rptr. 876 (1968); *Bennett v. H.K. Porter Co.*, 13 Ill. App. 3d 528, 301 N.E.2d 155 (1973); *W.W. Billington v. Crowder*, 553 S.W.2d 590 (Tenn. App. 1977).

25. 34 Colo. App. 320, 527 P.2d 912 (1974).

Regan, acting in his capacity as a licensed real estate broker and as an employee of Mansfield Realty Co., was the agent of defendant [seller]. He contacted defendant and told her he had procured a buyer, he prepared the contract, he obtained the signatures of the parties, and his employer, Lloyd Mansfield, was to receive a broker's commission under the terms of the contract. Regan is therefore estopped from denying the agency relationship. (citation omitted).<sup>26</sup>

As this passage illustrates, there is some uncertainty as to whether the court in *Lish* was basing its holding upon actual agency or estoppel — that is, whether Regan was really an agent of the seller or was merely estopped from denying it. However, among the factors cited in support of its holding the most significant appears to be the one absent in *Velten*: that the contract the broker drafted recited his position as agent and provided for payment of a commission to his firm. In other words, Regan's affirmative representation, the critical element of estoppel, was of crucial significance. This conclusion is reinforced by a review of the decision cited by the *Lish* court as its authority, *McCornick & Co. v. Tolmie Brothers*,<sup>27</sup> which is essentially an estoppel case. Thus, there was an important factor in *Lish* quite absent in *Velten*, and the *Velten* court's reliance upon the *Lish* decision was misplaced.

There is a considerable body of case law concerning when a real estate broker is, and is not, an agent for the seller. Many, but not all, of these cases have arisen in the context of brokers suing to collect commissions. Generally, the decisions specify that in order for there to be an agency relationship between seller (or purchaser) and broker, there must be a finding of a contract (or at least of a "meeting of the minds") between them for the agent's services.<sup>28</sup> This agreement may arise upon the principal's ratification of the broker's unauthorized acts,<sup>29</sup> but its existence is generally a question of fact, a jury question,<sup>30</sup> on which the party alleging agency has the burden of

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26. 34 Colo. App. 322, 527 P.2d at 914, citing *McCornick & Co. v. Tolmie Bros.*, 42 Idaho 1, 243 P. 355.

27. 42 Idaho 1, 243 P. 355 (1926). See also the application of estoppel theory in *dicta* in *Lester v. Marshall*, 143 Colo. 189, 352 P.2d 786, 790 (1960).

28. *Brewer v. Williams*, 147 Colo. 146, 362 P.2d 1033 (1961); *Baskin v. Dam*, 4 Conn. Cir. Ct. 702, 239 A.2d 549 (1967); *Arthur Rubloff & Co. v. Drovers Nat'l Bank*, 80 Ill. App.3d 867, 400 N.E.2d 614 (1980).

29. *Janes v. CPR Corp.*, 623 S.W.2d 733 (Tex. Civ. App. 1981).

30. *Weinberg v. Desser*, 243 Md. 347, 221 A.2d 66 (1966). See *Fletcher v. Garrett*, 167 Colo. 60, 445 P.2d 401 (1968); *Billington v. Crowder*, 553 S.W.2d 590 (Tenn. Ct. App. 1977),

proof.<sup>31</sup> To the extent that the appellate courts have spoken on the issue, it does not appear that the *Velten* factors of contract and obtaining signatures are conclusive or, perhaps, even sufficient to cause the case to be referred to a jury.

In *Bennett v. H.K. Porter Company, Inc.*<sup>32</sup> a real estate broker contacted a lessor who, he believed, might have had commercial space available for a potential lessee. There were substantial negotiations between the parties as a result of this contact, and the broker agreed to look to the lessee for his commission. Nevertheless, when the lessor arbitrarily broke off negotiations, the broker commenced suit against the lessor, claiming that it was acting as the lessor's agent also, and therefore entitled to compensation.

The appeals court reversed a jury verdict in favor of the broker. It pointed out that agency is not created "when the principal merely allows the broker to take part in negotiations" concerning the property, especially where the principal never accepts the broker as his agent or agrees to pay a commission, "even though the broker has played a significant part in the transaction."<sup>33</sup>

Of course in *Velten*, unlike *Bennett*, the seller did ultimately sign a contract, but otherwise the circumstances of compensation and non-acceptance of a listing were identical.<sup>34</sup>

An even clearer precedent is to be found in *Norville v. Palant*, an Arizona case.<sup>35</sup> There, a buyer was represented by a broker who managed, after much negotiation, to procure a contract from a seller, Norant. The broker, through two salesmen, negotiated the deal over several weeks. At one point, the seller offered to pay the broker a commission on the sale, but apparently the actual commission was paid by the buyer.

Subsequent to signing, and as part of a larger lawsuit, the seller alleged that the broker had failed to disclose to him certain facts regarding the deal, in violation of the broker's alleged fiduciary duty to the seller. The court found no such fiduciary duty. Rather, it

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*cert. den. mem.*

31. *Baskin v. Dam*, 4 Conn. Cir. Ct. at 708, 239 A.2d at 552.

32. 13 Ill. App. 3d 528, 301 N.E.2d 155 (1973).

33. *Id.* at 532, 301 N.E.2d at 158.

34. The actual signing of a contract upon terms negotiated by the broker is generally not deemed to be a necessary condition of receiving a commission. Absent a contrary provision in the listing agreement, the broker earns a commission upon finding a "ready, willing, and able" buyer. Thus the existence of an agency relationship in no way turns on actual contract execution. *Brewer v. Williams*, 147 Colo. 146, 362 P.2d 1033 (1961). Thus the only real point of distinction between *Velten* and *Bennett* is rendered irrelevant.

35. 25 Ariz. App. 606, 545 P.2d 454 (1976).

noted the broker-principal relationship between broker and buyer and the buyer's failure to consent to the broker representing the seller as reasons for its holding.<sup>36</sup> It dismissed the seller's offer to pay a commission as immaterial.

Thus in *Norville*, both of the *Velten* factors were present: there was contact between broker and seller, and the broker procured all parties' signatures on the contract of sale; yet the *Norville* court decided that the broker was not an agent of the seller.<sup>37</sup>

*Timmerman v. Ankrom*,<sup>38</sup> a 1972 Missouri case, represents another buyer brokerage decision in which the broker was held to have no fiduciary obligations to the sellers. In *Timmerman*, a broker (Dudley) representing an interested purchaser, presented first one, and then another, offer to Mr. and Mrs. Ankrom (plaintiffs), the owners of a farm. The broker initially contacted the Ankroms, prepared the offers, negotiated an acceptable price, prepared the final contract, and procured the signatures of all parties. In fact, the final contract even provided for the Ankroms to pay a commission. Yet, after reviewing the evidence the court upheld the trial court's finding that the broker was working exclusively for the buyer:

There is no direct evidence to show that Dudley was representing the seller as agent for him. As said in *Smith v. Piper* . . . "By the very nature of a broker's work he must deal with both buyers and sellers." It is only when he deals for both buyer and seller without disclosing that fact that the transaction is deemed constructively fraudulent in equity.<sup>39</sup> (Emphasis in original.)

Thus despite the existence of the *Velten* factors of contact and signature procurement (and even commission), the *Timmerman* court found "no direct evidence" to show an agency relationship between broker and seller.

To be sure, a commission arrangement was held to be sufficient evidence of agency (or at least of estoppel) in *M.S.R., Inc. v. Lish*,<sup>40</sup>

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36. On the impossibility of properly representing both parties without the informed, explicit consent of both, see *Warren v. Mangels Realty*, 23 Ariz. App. 318, 533 P.2d 78 (1975) (where buyer knew of agent's representation of seller and that seller had not consented to agent's representation of buyer, buyer could not claim agent represented him as well).

37. *Norville*, 25 Ariz. App. 606, 545 P.2d 454 (1976).

38. 487 S.W.2d 567 (Mo. 1972).

39. *Id.* at 571. See also *Brean v. North Campbell Professional Bldg.*, 26 Ariz. App. 381, 548 P.2d 1193 (1976) (the fact that the listing agreement contained seller's promise to pay the commission upon the sale of the property did not make broker the seller's agent).

40. 34 Colo. App. 320, 527 P.2d 912 (1974)

and in the California case of *Coons v. Gunn*,<sup>41</sup> where the sellers initially refused to employ the broker, but subsequently signed a sales contract wherein they specifically acknowledged the broker as their agent and agreed to pay a commission.<sup>42</sup> But this writer has uncovered no case which has gone as far as *Velten* and found agency as a matter of law upon the bare factors of broker contact and signature procurement. To the contrary, as one Tennessee court has held,

[t]here is a considerable difference in the legal effect of saying to a broker:

- (1) You are authorized to try to sell my farm; and
- (2) I will sell my farm on these terms to anyone. If you produce such a buyer, I will sell to him; but you will have to get your commission from him.<sup>43</sup>

In the first instance, as the court points out, an agency relationship is created; in the second, it is not.<sup>44</sup>

Despite the existence of the authority of the *Bennett, Norville, Timmerman, Coons*, and *Billington* cases, none of them were cited or distinguished in *Velten*. Whether they were actually considered by the *Velten* court is therefore unknown. It is clear, however, that the Colorado Court of Appeals has adopted a much more slender basis for a legal finding of agency than any of the courts that decided the available precedents.

#### *B. Imputation of the broker's non-disclosure to the buyers*

Upon determining that the buyers' broker had breached his fiduciary duty to the seller, the *Velten* court declined to order specific performance for the benefit of the buyers. The specific language of the court is as follows:

If, as here, the agent by the conveyance will acquire an equitable or beneficial interest in the property, then the agent must specifically disclose the nature of that interest to his principals. . . . The buyers were both parties to the contract which gave the beneficial interest to the salesman, and they may not now seek to disavow their responsibility for the

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41. 263 Cal. App. 2d 594, 69 Cal. Rptr. 876 (1968).

42. Cf. *Century 21 Quality Properties, Inc. v. Chandler*, 103 Idaho 193, 646 P.2d 435 (Id. Ct. App. 1982), (where a similar clause was held insufficient to satisfy the Idaho Statute of Frauds) *petition for review denied mem.*

43. *Billington v. Crowder*, 553 S.W.2d 590, 593 (Tenn. Ct. App. 1977), *cert. denied mem.*

44. *Id.*

salesman's failure to disclose this interest to the seller.<sup>45</sup>

The authority cited by the *Velten* court for this statement was *M.S.R., Inc. v. Lish*,<sup>46</sup> in which, it will be recalled, a broker (Mansfield) and his agent (Regan) failed to disclose to their seller that the buyer was a corporation in which they held a controlling interest. In *Lish* the court found that because of this controlling interest, the brokers' breach of fiduciary duty would be imputed to the buyer. This seems to be a point well-established in law.<sup>47</sup>

In *Velten*, however, the buyers were unrelated to the broker, except for the shared-appreciation structure of the broker's commission. While there is a line of authority authorizing rescission even in such circumstances, it would seem unduly harsh in this case. There is no evidence that the *Velten* buyers were or ever had been real estate brokers or that they were aware of the broker's duty of disclosure.<sup>48</sup> Nor is there any evidence cited by the court that the buyers viewed the broker as the seller's agent. In the cases authorizing rescission against unrelated buyers, the agency of the broker to the seller appears to have been unquestioned, or there was a co-conspiracy by the purchasers with the agent to benefit from what everyone should have understood was a breach of duty.<sup>49</sup>

Perhaps a better remedy in *Velten* would have been for the court to decree the broker a constructive trustee of his illegal profits, with the seller as beneficiary, while enforcing the interests of the innocent buyers.<sup>50</sup>

#### IV. PUBLIC POLICY EFFECTS OF *Velten*

At this point, *Velten* is mandatory authority only in Colorado. Hence in analyzing its probable effect, this discussion will be limited to Colorado.

As a result of *Velten*, it is unlikely a prospective purchaser of real property can employ a real estate broker on a commission basis

45. 671 P.2d at 1012.

46. 34 Colo. App. 320, 527 P.2d 912 (1974).

47. The *Lish* decision relies on both *Williams v. Wagers*, 117 Colo. 141, 184 P.2d 497 (1947) and *Treat v. Schmidt*, 69 Colo. 190, 193 P. 666 (1920).

48. This fact has been confirmed in personal conversation with one of the buyers.

49. See, e.g., *Wells v. Francis*, 7 Colo. 396, 4 P. 49 (1884); *Smith v. Seattle L.S. & E. Ry. Co.*, 25 N.Y.S. 368 (Sup. Ct. 1893).

50. Colorado recognizes and has applied the remedy of constructive trust in cases where a fiduciary has breached a duty to a principal. *Unicare, Inc. v. Thurman*, 42 Colo. App. 241, 599 P.2d 925 (1979), *cert. den. mem.*; *Botkin v. Pyle*, 91 Colo. 221, 14 P.2d 187 (1932). See also *Gruenwald v. Mason*, 139 Colo. 1, 335 P.2d 879 (1959) (remedy recognized but not applied).

with full confidence that the broker will be able to avoid conflicts of interest. As noted above, in those cases in which the "buyer's broker" is to be paid a share of the listing broker's commission (Situations (1) and (2)), he had, even before *Velten*, been considered an agent of the seller.

The *Velten* case involved a fact pattern fitting within the framework of Situation (3): the buyer pays his own broker; the seller has none. Since, realistically, it is impossible for a broker in Situation (3), hoping to earn a commission, to avoid contacting the seller and procuring the seller's name on the contract, it follows perforce that a broker in Situation (3) must be an agent of the seller alone or, at best, a dual agent.<sup>51</sup>

It is not certain if the *Velten* rule applies to Situation (4), in which each party has a broker and each pays his own commission. Certainly it could be argued that the rule does not so apply because (a) the existence of a seller's broker may tend to negate a showing of intent that the buyer's broker will act for the seller, and (b) the buyer's broker will not have the kind of direct contact with the seller he had in *Velten*. But it is also possible to argue the contrary by pointing out that in the usual "co-op" situation the buyer's broker is the seller's sub-agent, and while in most "co-op" arrangements the buyer's broker is paid by the seller, the *Velten* court obviously thought little of the probative power of compensation arrangements. Moreover, it can be argued, there is little difference between contacting the seller and contacting his agent. To the contrary, in such situations the seller's broker is merely deputizing the buyer's broker to sell the property for him. By this approach, then, the rule in *Velten* could be extended to Situation (4) cases as well.<sup>52</sup>

More telling in practical consequences than purely legal arguments, however, is this fact that when a buyer's broker sets out to search for a property he may not know whether the best property for his purchase is listed with another agent. If it is not so listed, he runs the risk of falling against the *Velten* tripwire. If he shuns unlisted properties, he violates his fiduciary duty to his buyer. If a suitable property is listed, the broker may or may not be subject to the *Velten* decision, depending on whether the argument of the preceding paragraph is adopted by subsequent court rulings.

The practical effect of the *Velten* conflict of interest situation

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51. The possibility of avoiding this result through draftsmanship is discussed *infra*.

52. See *supra* notes 10 and 12.

can be seen in the following example:

*A* employs a Broker, *B*, to locate for him a good investment property. *B* approaches *O*, whose property is on the market at a somewhat under-valued price. (In an investment real estate context, a low price means a higher rate of return.) If *B* informs *O* of the undervaluation, he breaches his duty to *A* to locate the best possible investment. If *B* does not inform *O* of the undervaluation, he breaches his fiduciary duty to *O*. Moreover, as *O*'s agent, *B* should not only inform *O* of the undervaluation, but, affirmatively suggest ways in which it can be sold for more!

One way a prospective purchaser could escape this dilemma would be to employ a broker as a real estate consultant and undertake the direct contacts with property owners himself. Under these circumstances, however, the broker will not be legally permitted to draft the relevant documents necessary for the sale since doing so constitutes the practice of law. A broker in Colorado does have a limited right to practice law by drafting real estate documents, but only where he is the "agent of sale" in a transaction and charges no drafting fee except his pre-set commission.<sup>53</sup> This implies that, in addition to employing a broker on a consulting basis only, it will be necessary for the documents of sale to be prepared by an attorney.

Real estate brokers are required by the Colorado Real Estate Commission and encouraged by the Code of Ethics of the National Association of Realtors to recommend that sellers and buyers employ legal counsel.<sup>54</sup> However, in this author's experience as a real estate practitioner, this is often not done. Moreover, even when consulting legal counsel is recommended by brokers, purchasers and sellers, who often have an exaggerated idea of the cost of legal services, frequently do not follow this recommendation.<sup>55</sup> Hence one positive effect of the *Velten* case may be to encourage purchasers at least, if not sellers, to employ legal counsel before signing a contract. This would have the salutary effects of better protecting purchasers' legal rights, and of reducing the volume of real estate litigation in

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53. *Conway-Bogue Realty Inv. Co. v. Denver Bar Assoc.*, 135 Colo. 398, 312 P.2d 998 (1957); *Op. Atty. Gen. (Colo.)*, Dec. 12, 1967.

54. COLORADO REAL ESTATE COMM'N Rule E(14); National Ass'n of Realtors, Code of Ethics, art. 17, § 21; STATE OF COLORADO, REAL ESTATE MANUAL § 19, at 3, § 21, at 24, and § 22 (2d Printing, June 1, 1982).

55. Natelson, *Legal Counsel Vital in Real Estate Sale*, *Denver Post*, Dec. 6, 1981, § 6, at 12; for a reported case in which a broker failed to recommend employment of legal counsel, see *Lester v. Marshall*, 143 Colo. 189, 352 P.2d 786 (1960).

Colorado.<sup>56</sup>

On the other hand, the advantages of these effects may be outweighed by the inability of purchasers to employ commissioned agents to represent their interests exclusively, and by the inability of brokers to offer their services as representatives of buyers' interests. The employment of an attorney-consultant team, while possible, still compels the buyer to negotiate on his own behalf or through his attorney. Neither the seller nor his lawyer may have the specialized real estate market knowledge possessed by most brokers. The *Velten* court's creation of this dilemma for buyers would seem inconsistent with the "freedom of choice of agent" policy that has previously been enunciated by the Colorado Supreme Court.<sup>57</sup>

One possible way to minimize the effect of *Velten* is for a buyer's broker to induce the seller to sign a statement acknowledging (1) that the broker represents only the buyer, and (2) that the seller has the right to employ his own real estate and legal advisors. Besides the fact that some sellers may be unwilling to sign such a statement, there are other problems inherent in that procedure from the point of view of the buyer and his broker. First, the statement would have to be signed no later than the time of contract. Second, potential abuse of such disclaimers may induce the courts to apply standards to them comparable to disclaimers of warranties under the Uniform Commercial Code,<sup>58</sup> or to disclaimers of warranties of habitability and workmanship.<sup>59</sup> This development would subject such disclaimers to the same kind of uncertainty and litigation which has accompanied warranty disclaimers. Third, one could not be certain, in the absence of decided cases, at what point such a disclaimer or acknowledgement became effective. If the statement were signed at the time the sales contract was signed, a seller might well argue that a buyer's broker was also his fiduciary in the course of the preceding negotiations. If it were signed still earlier, but after some discussion between the parties, different standards for the "before" and "after" negotiations might have to be applied. The potential result of such uncertainty is a system in which a buyer's broker shoves a disclaimer form at a seller along with his business card, and refuses to speak

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56. *Natelson*, *supra* note 55.

57. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 416, 312 P.2d 998, 1007 (1957).

58. U.C.C. §§ 2-312 and 2-316 (1978).

59. *See, e.g.*, *Belt v. Spencer*, 41 Colo. App. 227, 585 P.2d 922 (1978); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1980); *Sallinger v. Mayer*, 304 So.2d 730 (La. App. 1974); *MacDonald v. Mobley*, 555 S.W. 2d 916 (Tex. Civ. App. 1977).

with him before he signs it.

## V. CONCLUSION

The overall result of *Velten v. Robertson* is to limit effective commissioned real estate brokerage in Colorado to the representation of sellers. Real estate purchasers must understand that commissioned brokers are prevented by law, or uncertainty about the law, from representing buyers' interests alone or, perhaps, buyers' interests at all, and that it is the responsibility of potential buyers to devise such arrangements as they can for acceptable substitute procedures. Whether these substitute procedures can fully replace the buyer's commissioned broker who serves only his own client is a matter of substantial doubt at this point.

Unfortunately, a petition for a writ of certiorari to the Colorado Supreme Court sought by the buyers in the *Velten* case was recently denied. Under the circumstances, the Colorado General Assembly or the Real Estate Commission may find remedial action worthwhile.