

Exhibit 10  
Business Brokers Can Go Broke:  
Some Words of Caution About Transactions Involving  
Real Estate

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**BUSINESS BROKERS CAN GO BROKE:  
SOME WORDS OF CAUTION ABOUT TRANSACTIONS  
INVOLVING REAL ESTATE**

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**PLEASE NOTE:**

This work is summary in nature and does not constitute professional legal advice. If advice is sought in connection with a particular transaction, be sure to consult a professional who has the opportunity to consider the law, the facts and all of the factors relevant to the particular transaction.

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## SUMMARY

Research reveals that business brokers, including merger and acquisition advisors, may not get paid for transactions that involve an interest in real estate if the broker or advisor is not a licensed real estate broker. Following is an outline of a sampling of state laws that may determine whether a broker or advisor risks not getting paid. The outline concludes with some possible solutions.

There are three categories of such state laws:

- I. Jurisdictions holding that a license is necessary to collect a commission. This appears to be the position in most states.
- II. Jurisdictions holding that if the real estate involved in the transaction is merely incidental to the transaction, then a commission may be recovered.
- III. Jurisdictions holding that the transfer of a business is not the type of transaction the legislature intended to be regulated by the licensing laws. Therefore, a commission may be recovered as long as the transfer of real estate is not the dominant feature of the transaction. Even though real estate may be a significant portion of the transaction, the broker is still not required to be a licensed real estate broker.

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## OUTLINE

### I. Jurisdictions holding that a license is necessary to collect a commission.

#### A. Arizona

##### 1. Statutes

- a. Title 32. Professions and Occupations. Chapter 20. Real Estate. Article 2. Licensing.
- b. ARIZ. REV. STAT. ANN. § 32-2122 et seq. (West 1999).
- c. ARIZ. REV. STAT. ANN. § 32-2152 (enjoins collection action if not a licensed real estate broker).
- d. ARIZ. REV. STAT. ANN. § 32-2165 (provides that those performing real estate broker services without a license may be found guilty of a Class 5 felony).

##### 2. Cases

- a. Bonasera v. Roffe, 8 Ariz. App. 1, 442 P.2d 165 (1968) (commission denied on sale of a tavern consisting of furniture, fixtures, equipment and a leasehold interest in real estate).

#### B. California (\*) (°)

##### 1. Statutes

- a. Business & Professions Code Division 4. Real Estate. Part 1. Licensing of Persons. Chapter 3. Real Estate Regulations. Article 1. Scope of regulation.
- b. Cite as: CAL. BUS. & PROF. CODE § 10130 et seq. (Deering 2000).
- c. CAL. BUS. & PROF. CODE § 10136 (enjoins collection action if not a licensed real estate broker).
- d. CAL. BUS. & PROF. CODE § 10139 (states that any person acting as a real estate broker without a license may be fined up to \$10,000 (corporations up to \$50,000) and/or imprisoned up to six months).

##### 2. Cases

- a. All Points Traders, Inc. v. Barrington Associates, 211 Cal. App. 3d 723, 259 Cal. Rptr. 780 (1989) (investment banking firm specializing in mergers and acquisitions "must possess a real estate broker's license when negotiating the sale of the business opportunity offered by a corporation seeking to transfer all of its stock to a prospective buyer.").
- b. Abrams v. Guston, 110 Cal. App. 2d 556, 243 P.2d 109 (1952) (commission could not be recovered by unlicensed broker for sale of mining mill and equipment and lease of real estate on which mill was located; any negotiations in the sale of a business are considered to fall under the definition of a real estate broker and when a transaction is not severable, i.e., where the realty and the personalty cannot be separated, then one may not recover a commission on the entire transaction).

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- c. ISH Management Services, Inc. v. Hanny Magnetics Ltd., (unpublished opinion) 1998 U.S. App. LEXIS 931 (9th Cir. 1998) (business consultant denied nearly \$900,000 in contingent success fee from multimillion dollar purchase of companies because consultant was not licensed real estate broker).
  - d. Lindenstadt v. Staff Builders, Inc., 55 Cal. App. 4th 882, 64 Cal. Rptr.2d 484 (1997) (California recognizes a finder's exception to the real estate licensing act; if one simply finds and introduces a prospective buyer to a potential seller then finder does not need to be licensed in order to receive a commission).

### C. Colorado

#### 1. Statutes

- a. Title 12. Professions and Occupations. Article 61. Real Estate. Part 1. Brokers and Sales Persons. 12-61-101.
- b. Cite as: COLO. REV. STAT. ANN. § 12-61-101 et seq. (West 1999)
- c. COLO. REV. STAT. ANN. § 12-61-102 (West 1999) (states that it is unlawful to act as a real estate broker without a license).
- d. COLO. REV. STAT. ANN. § 12-61-119 (West 1999) (provides for possible fine (up to \$5,000 for a corporation) and/or imprisonment (up to six months) for practicing without a license; in addition, those practicing without a license are guilty of a misdemeanor).

#### 2. Cases

- a. Broughall v. Black Forest Dev. Co., 196 Colo. 503, 593 P.2d 314 (1978) (Colorado follows the "New Jersey rule", and "a finder or a business broker must have a real estate broker's license if the sale of business includes a transfer of any interest in real estate.").
- b. Lieff v. Medco Professional Services Corp., 973 P.2d 1276 (Colo. Ct. App. 1998) (following Broughall and holding that "there is no requirement that real estate or a leasehold be transferred from one legal entity to another to trigger the licensure requirements . . . [if there is] an indirect change in a leasehold interest . . . the licensure requirements apply.").

### D. Minnesota (°)

#### 1. Statutes

- a. Securities, Commercial Regulations. Chapter 82. Real Estate Brokers and Salespersons.
- b. Cite as: MINN. STAT. ANN. § 82.17 et seq. (West 1999).
- c. MINN. STAT. ANN. § 82.33 (West 1999) (enjoins collection action if not a licensed real estate broker).
- d. MINN. STAT. ANN. § 82.32 (West 1999) (provides that anyone who violates this act is guilty of a gross misdemeanor).

2. Cases

- a. Gahagan v. Patterson, 316 F. Supp. 1099 (D. Minn. 1970) (Minnesota and Wisconsin law will bar an action for recovery of a commission by an unlicensed broker when the sale of the business involves real estate).
- b. Northstar Industries, Inc. v. H.J. Heinz Co., U.S. 1982 Dist. LEXIS 9279 (1982) (one who merely brings parties together will not be subject to the licensing requirements).

E. Missouri

1. Statutes

- a. Chapter 339. Real Estate Agents, Brokers, Appraisers and Escrow Agents.
- b. Cited as: MO. REV. STAT. § 339.010 et seq.
- c. MO. REV. STAT. § 339.160 (enjoins collection action if not a licensed real estate broker).
- d. MO. REV. STAT. § 339.170 (provides that any person violating these provisions is guilty of a class B misdemeanor).

2. Cases

- a. Knight v. Johnson, 741 S.W.2d 842 (Mo. App. E.D. 1987) (business broker may not sue to recover a commission from the sale of a business where assumption of a real estate lease was part of the sale).
- b. King v. Clifton, 648 S.W.2d 193 (Mo. App. S.D. 1983) (finding a buyer constitutes acting as a real estate broker or salesperson and therefore one must be a licensed real estate broker or salesperson in order to recover a finder's fee).

F. New Jersey (\*)

1. Statutes

- a. Title 45. Professions and Occupations. Subtitle 1. Professions and occupations subject to state boards of registration and examination. Chapter 15. Real estate brokers, broker-salespersons, and salespersons.
- b. Cite as: N.J. STAT. ANN. § 45:15-1 et seq. (West 1999).
- c. N.J. STAT. ANN. § 45:15-3 (West 1999) (enjoins collection action if not a licensed real estate broker; provides that practicing without a license is a violation of this act).
- d. N.J. STAT. ANN. § 45:15-16.46 (West 1999) (stating that any person who violates any provision of this act shall be fined not less than \$250 and not more than \$50,000).

2. Cases

- a. Kazmer-Standish Consultants, Inc. v. Schoeffel Instruments Corp., 89 N.J. 286, 445 A.2d 1149 (1982) (business broker in the sale of an ongoing business may recover a commission for the part of the sale attributable to personalty, even if real estate is the dominant feature of the transaction).

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- b. Cooney v. Ritter, 939 F.2d 81 (3rd Cir. 1991) (business broker could recover a commission only on as much of the purchase price for the controlling stock of an incorporated business as is attributable to personalty owned by the corporation).

#### G. Ohio

##### 1. Statutes

- a. Title 47. Occupations – Professions, Chapter 4735: Real Estate Brokers.
- b. Cited as: OHIO REV. CODE ANN. § 4735 et seq. (Anderson 1999).
- c. OHIO REV. CODE ANN. § 4735.21 (Anderson 1999) (enjoins collection action if not a licensed real estate broker).
- d. OHIO REV. CODE ANN. § 4735.99 (Anderson 1999) (provides that one may be found guilty of a misdemeanor in the first degree for acting as a real estate broker without a license).

##### 2. Cases

- a. DeMetre v. Savas, 93 Ohio App. 367, 51 Ohio Op. 155, 113 N.E.2d 902 (1953) (business broker must be a licensed real estate broker in order to recover a commission for any single transaction, whether the real estate involved is a significant or incidental part of the entire transaction).
- b. The Innovator's Group, Inc. v. Riverside Enterprises, Inc. et al., 1990 Ohio App. LEXIS 398 (following DeMetre and holding that the procuring of prospects which results in the sale of any real estate qualifies one as a real estate broker as a matter of law).

#### H. Texas

##### 1. Statutes

- a. Title 113A – Real Estate Dealers art. 6573a. The Real Estate License Act.
- b. Cite as: TEX. REV. CIV. STAT. ANN. art. 6573a et seq. (2000).
- c. TEX. REV. CIV. STAT. ANN. art. 6573a § 20(a) (enjoins collection action if not a licensed real estate broker).
- d. TEX. REV. CIV. STAT. ANN. art. 6573a § 19(a) (provides penalties for those practicing without a license including fines and imprisonment).

##### 2. Cases

- a. Hall v. Hard, 160 Tex. 565, 3 Tex. Sup. J. 188, 335 S.W.2d 584 (1960) (remanding to the trial court the issue of whether or not leases were included in the sale of a trucking business, stating that if real estate leases were included in the sale, then the sale involved real estate and the unlicensed broker would not be able to recover a commission on the sale).
- b. David Gavin Co. v. Gibson, 780 S.W.2d 833 (Tex. Ct. App. 1989) (consultant denied commission for locating automobile dealership because asset purchase would have included real estate).

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- c. H.H. Anderson v. Republic National Life Insurance Co., 623 S.W.2d 162 (Tex. Ct. App. 1981) (the activities of a finder fall under the statute; therefore, finders must be licensed in order to sue for a finder's fee).

## I. Wisconsin

### 1. Statutes

- a. Regulation and licensing. Chapter 452. Real Estate Practice.
- b. Cite as: WIS. STAT. ANN. § 452.01 et seq. (West 1999).
- c. WIS. STAT. ANN. § 452.20 (West 1999) (enjoins collection action if not a licensed real estate broker).
- d. WIS. STAT. ANN. § 452.17 (West 1999) (provides penalties for practicing without a license including imprisonment up to six months and/or a fine of up to \$1,000).

### 2. Cases

- a. Payne v. Volkman, 183 Wis. 412, 198 N.W. 438 (1924) (one must be a licensed real estate broker in order to recover a commission on the sale of real estate).
- b. Chapman Co. V. Service Broadcasting, 52 Wis.2d 32, 187 N.W.2d 794 (1971) (unlicensed broker denied commission for arranging the sale of a radio station).
- c. George Nangen & Co. v Kenosha Auto Transport Corp., 238 F.Supp. 157 (E.D. Wis. 1965) (unlicensed broker denied commission for finding a buyer and negotiating the sale of a business of highway transportation of automobiles).

## Footnotes

(\*) Jurisdictions allowing the commission to be divided into portions involving personalty and portions involving realty.

- California
- New Jersey

(°) Jurisdictions allowing for a finder's exception

- California
- Minnesota



II. Jurisdictions holding that if the real estate involved in the transaction is merely incidental to the transaction, then a commission may be recovered.

A. Illinois

1. Statutes

- a. Real Estate License Act of 2000.
- b. Cited as: 225 ILL. COMP. STAT. 454.
- c. 225 ILL. COMP. STAT. 454/10-15(a)-(b) (enjoins a collection action if one is not a licensed real estate broker).
- d. 225 ILL. COMP. STAT. 454/20-80 (provides the penalties for violating this Act including fines and criminal convictions).

2. Cases

- a. Ceas Mortg. Co. v. Walnut Hills Associates Ltd., 312 Ill.App.3d 242, 244 Ill.Dec. 720, 726 N.E.2d 695 (2000) (corporation that is not licensed as a real estate broker may not bring an action to recover the commission of one of the corporation's employees, even if that employee is a licensed real estate broker).
- b. Thomas v. Daubs, 291 Ill. App. 3d 682, , 226 Ill. Dec. 15, 684 N.E.2d 1011 (1997) (where real estate is merely incidental to the sale of an entire business, the broker need not be licensed. In this case, a sale of a landfill did not fall under the "merely incidental" exception and the consultant was barred from collection of \$198,000 finder's fee plus 6% of revenue under oral contract for the sale of the landfill because the finder was not licensed).
- c. J.H. Chapman Group, Ltd. V. Pita Baking Co., 205 Ill.App.3d 1031, 150 Ill. Dec. 834, 563 N.E.2d 961 (1990) (Court upheld trial court decision barring recovery of a commission to an unlicensed broker for services including brokering the sale of a business, renegotiating a lease for a gyros manufacturing operation, and locating a new facility for that operation).

3. The Business Brokers Act of 1995

- a. 815 ILL. COMP. STAT. 307/10-5.10 (provides the definition of a business broker).
- b. 815 ILL. COMP. STAT. 307/10-5.15 (defines business).
- c. 815 ILL. COMP. STAT. 307/10-65 (states that willful violation of the act is a Class 4 felony).
- d. 815 ILL. COMP. STAT. 307/10-55 (states that those violating this act may be fined up to \$10,000).

4. Cases involving the Business Brokers Act of 1995

- a. Thomas v. Daubs, 291 Ill. App. 3d 682, 226 Ill. Dec. 15, 684 N.E.2d 1011 (1997) (legislature did not intend for the Business Brokers Act to provide a way for brokers to circumvent the Real Estate License Act).
- b. Sandra F. Monroe Co. v Nat'l Equip. Servs., 2000 U.S. Dist. Lexis 5480 (E.D. Ill. 2000) (action for a broker's fee dismissed because the broker suing for the fee was not licensed, as required, under Business Brokers Act).

III. Jurisdictions holding that the transfer of a business is not the type of transaction the legislature intended to be regulated by the licensing laws.

A. New York

1. Statutes

- a. Real Property Law Article 12-A. Real Estate Brokers and Real Estate Salesmen. § 442-a.
- b. Cite as: N.Y. REAL. PROP. LAW § 442-a et seq. (Consol. 1999).
- c. N.Y. REAL. PROP. LAW § 442-a (Consol. 1999) (enjoins collection action if not a licensed real estate broker).
- d. N.Y. REAL. PROP. LAW § 442-e (Consol. 1999) (provides that those violating this act are guilty of a misdemeanor and may be fined up to four times the amount of the commission received for unlicensed services).

2. Cases

- a. Weingast v. Rialto Pastry Shop, Inc., 243 N.Y. 113, 152 N.E. 693 (1926) (broker could recover a commission for negotiating the sale of a going business, including a lease, because the transfer of real estate was not the "dominant purpose" of the transaction; the purpose of the law requiring real estate brokers to procure a license is not to protect businessmen; the law is not intended to apply to those who sell or exchange businesses).
- b. G.C. Fortune Mngmt. Co. v. Stockade Mobile Home Park, 667 N.Y.S.2d 489, 246 A.D.2d 739 (N.Y. App. Div. 1998) (one must look at the nature of the transaction at issue to determine if the broker must be licensed; if the dominant or principal feature of the parties' transaction is the sale of real estate, then a license is required).
- c. Wertlieb v. Greystone Partnerships Group, Inc., 569 N.Y.S.2d 61, 165 A.D.2d 644 (N.Y. App. Div. 1991) (Section 442 does not apply to those selling businesses as a going concern).
- d. Dodge v. Richmond, 173 N.Y.S.2d 786, 5 A.D.2d 593 (N.Y. App. Div. 1958) (if real estate is a significant, but not dominant, feature of the transaction, then one need not be a licensed real estate broker in order to recover a fee).

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### SOME POSSIBLE SOLUTIONS

Following are some possible solutions to the risk of business brokers, including merger and acquisition advisors, not getting paid for transactions that involve an interest in real estate if the broker or advisor is not a licensed real estate broker.

1. Include clauses in the transaction agreement that explain the broker or advisor is not a licensed real estate broker and preclude the client from raising that fact as a defense in a fee or commission dispute. There are benefits and drawbacks to such clauses. Further, some jurisdictions may conclude such clauses are not enforceable.

2. Become a licensed real estate broker. Each state has its own licensing requirements, including whether individuals, entities or both should be licensed or need to be licensed.

3. Lobby for changes in the statutes governing real estate brokers and the types of transactions in which business brokers or merger and acquisition advisors are involved.