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Finders and Finders' Feeds

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FINDERS AND FINDERS' FEES

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Finders have long played an integral role in the world of commerce but only recently has a body of common law been developed to deal with their activities. This is due in part to the peculiar nature of a finder's business and in part to the reluctance of courts to depart from traditional legal concepts that "almost" fit the legal problems raised in finders' cases.

In his article, Mr. Benson describes the normal operations of a finder, compares finders to brokers and agents, and analyzes the finder's operations in hopes of determining appropriate legal principles. The case of Consolidated Oil & Gas, Inc. v. Roberts, *162 Colo. 149, 425 P.2d 282 (1967) is used to illustrate a typical factual situation in finders' cases and to provide a basis for the legal analysis presented in the paper. The author concludes by presenting the key elements in any case involving a claim by a finder for his fee.*

INTRODUCTION

WHILE finders are as old as commerce, it is only in recent years that finders have assumed an acknowledged position in the entrepreneurial world, and with it, a developing status in the common law. Early cases involving finders often used the terms finder, broker, and agent interchangeably,[1] and the confusion is understandable since their functions, modes of operation, and rights to compensation are very similar.[2] More recently, however, courts have recognized that the traditional rules of law relating to brokers and agents are not always adequate to define the rights, duties, and responsibilities of a finder.[3] Consequently, today's decisions reflect a tailoring of the traditional legal principles to fit the unique role of the finder in modern business life.

This article will first examine the nature of a finder and then review the case of *Consolidated Oil & Gas, Inc. v. Roberts,*[4] a finders' fee case that provides an excellent illustration of the developing factual and legal framework within which the finder works. Thereafter, the

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[1] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 157, 425 P.2d 282, 286 (1967).

[2] COLO. REV. STAT. ANN. § 117-1-2 (1963) defines broker as "any person, firm, partnership, association, or corporation who, in consideration of compensation by fee, commission, salary, or any thing of value, or with the intention of receiving or collecting such compensation, 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 acts . . . ."

[3] As is always the case, when a new subject category of common law develops, the rules of analogous areas are borrowed. Thus, in many ways a finder is a "broker" within the customary legal structure, and these broker principles are borrowed to start the legal structuring of the "finder."

[4] 162 Colo. 149, 425 P.2d 282 (1967).

specific problems of the finder's legal position will be considered; namely, the elements of a finder's cause of action and the measure of recovery to which a finder is entitled.

I. Definition of a Finder

Probably everyone from time to time is a finder, whether the "find" be a bargain at the local department store or a hot tip for investments. The finder with which this article is concerned, however, is the professional finder, the man who finds and reveals information of business opportunities for a fee — *e.g.*, he who finds businesses available for purchase or sale; prospective buyers or sellers of goods; and available financing, investments, and employment.[5] Finders are also active in connection with corporate mergers and securities underwriting, many men devoting their full time to finding employment opportunities for underwriters and underwriters for companies seeking to issue stock.[6] In addition, finders are often engaged in seeking funds which are available for purchasing securities issues.

The role and efforts of a finder may vary dramatically according to the needs and wishes of the parties with whom he is dealing and the type of opportunities with which he is familiar. As a result, the description of a finder's functions and the legal principles applicable thereto have varied considerably. In *Seckendorff v. Halsey, Stuart & Co.*,[7] the court apparently felt that finders play a very limited role with minimal duties:

> Plaintiff was in nowise a broker. . . . He was merely a finder of this piece of business. He was to receive his compensation for finding the business and bringing the same to the attention of Rogers, Caldwell & Co. and its associates. He claimed his compensation solely on the ground that he was the originator of the business and had disclosed to Rogers, Caldwell & Co. and its associates the opportunity to engage in its financing.[8]

And in *Baldwin v. Grymes*,[9] the court also saw a limited role for the finder but recognized that his services might consist of something more than merely revealing an opportunity: "A 'finder,' it has been said, is one who finds, interests, introduces and brings together parties for

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[5] *See, e.g.*, Lindeman v. Textron, Inc., 229 F.2d 273 (2d Cir. 1956) (presenting the advantageous purchase of one textile company to another); Weinreb v. Strauss, 80 A.2d 47 (Mun. Ct. App. D.C. 1951) (finding a retail liquor store for sale); Garrett v. Wall, 29 Ga. App. 642, 116 S.E. 331 (1923) (finding and introducing prospective purchaser of saw mill timber); Miller & Demton v. Batten, 247 Ky. 339, 57 S.W.2d 33 (1933) (introducing a prospective purchaser of an oil and gas lease).

[6] An illuminating description of the role of finders in the securities field is set forth in C. Israels & G. Duff, When Corporations Go Public 36-40 (1962).

[7] 234 App. Div. 61, 254 N.Y.S. 250 (1931), *rev'd on other grounds*, 250 N.Y. 353, 182 N.E. 14 (1932).

[8] *Id.*, 254 N.Y.S. at 260.

[9] 232 Md. 470, 194 A.2d 285 (1963).

a deal, even though he has no part in negotiating the terms of the transaction."[10]

On the basis of the language in *Consolidated Oil & Gas, Inc. v. Roberts*,[11] the finder's duties, at least in the oil and gas industry, may be more substantial:

> The usual type of broker's commission case in the regulated real estate business in Colorado, as is urged by the defendant, is not necessarily in point here. For example, oil and gas brokers do not evaluate the properties, nor do they necessarily enter into the negotiations or consummate the transactions, *i.e.*, handle the closing. Such brokers' or finders' principal activities and services are to locate a property or lease, bring it to the attention of a prospective buyer and thereafter to obtain the requested data if possible. He is then only paid a commission if the property is actually acquired by his prospect.[12]

From the above cases it is apparent that the appropriate definition of a finder is often a factual question and that the only description that would include all those properly considered to be finders might simply be one who "finds, introduces, and brings together parties to a business opportunity . . . ."[13] Any more extensive definition of a finder's role, the conditions as to his compensation, or the opportunities with which he deals would inevitably be honored only in its exceptions.

Having briefly examined the nature of a finder's activities, a comparison of finders to brokers and agents is necessary to further clarify a finder's role and the legal principles applicable thereto. Depending upon the services a finder undertakes to perform and his relationship to his "buyer", he may act as an agent or as a broker. When he is engaged by another to locate a specific type of opportunity, he functions much like an agent and the law of agency may be determinative of his duties, rights, and obligations.[14] For example, the finder would have the customary responsibilities of loyalty and good faith to his principal,[15] and he could neither deal in the agency matter for his own benefit without the knowing consent of his principal,[16] nor could he act adversely to the interests of his principal by serving or acquiring any private interest of his own in antagonism or opposition thereto.[17] Further, he would be required to account to his principal for any secret

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[10] *Id.* at 472, 194 A.2d at 287.

[11] 162 Colo. 149, 425 P.2d 282 (1967).

[12] *Id.* at 157, 425 P.2d at 286.

[13] Annot., 24 A.L.R.3d 1160, 1164 (1969).

[14] Because a finder seldom acts as an agent and because his duties are not totally consistent with most agents' duties, he would probably be considered a slightly peculiar type of agent, but the general laws of agency would still apply.

[15] *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 387-98 (1957). The determination of the existence of an agency capacity of a finder generally would be no different than any other agent.

[16] *Id.* § 389.

[17] *Id.* § 387.

profit he may have realized in the course of his agency, even though the principal has suffered no loss.[18]

It is also true that as an agent, a finder cannot act for both parties to the opportunity, unless both parties consent at least as to matters involving the exercise of discretion.[19] Indeed, if the agent does so act, principal has a right to all compensation received by the agent from the other party;[20] has no obligation to compensate the agent;[21] and may even have the right to avoid the transaction. However, if the double agency is known to both principals, there is no violation of duty.[22]

When a finder learns of an opportunity independently and then seeks out persons who might be interested in such an opportunity, he acts not as an agent but as a broker. In such capacity he may introduce parties, assemble information, and assist in negotiations but cannot attempt to serve the particular interest of either side. His efforts are directed toward consummation of the transaction,[23] and to this end he assists either party. In these circumstances, the finder has no obligation of loyalty or duty to either party.[24] Similarly, he may receive a fee from both parties to the proposed transaction.

While the above discussion might suggest that a finder is a broker when acting independently, a finder can be distinguished from a broker by the limited subject matter of a broker's activities, the minimal duties of a finder, and the informality of the agreement between a finder and and the parties to the underlying transaction or opportunity. The *Consolidated Oil* case makes this distinction clearer and also suggests some of the problems which arise in finders' cases.

II. *Consolidated Oil & Gas, Inc. v. Roberts*

Consolidated Oil & Gas, Inc. v. Roberts [25] involved a somewhat typical finder situation, wherein the plaintiff sought compensation for disclosing a business opportunity to the defendant. While the court was somewhat ambiguous in its determination of the legal status of

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[18] *Id.* §§ 388, 403.

[19] *Id.* §§ 391, 392, 394.

[20] *Id.* § 388.

[21] *Cf.* Whittenberg v. Carnegie, 328 Mich. 125, 42 N.W.2d 900 (1950); McMichael v. Burnett, 136 Kan. 654, 17 P.2d 932 (1933).

[22] *Cf.* Fitzsimons v. Southern Exp. Co., 40 Ga. 330 (1869); Brockman v. Delta Mfg. Co., 184 Okla. 357, 87 P.2d 968 (1939); Rice v. Davis, 136 Pa. 439, 20 A. 513 (1890).

[23] The fact that the finder performs services may be relevant to our earlier considerations. First, it may indicate an implied assent that he is required to perform other services in order to be entitled to compensation. Second, particularly if the services aid the party from whom no compensation is sought, services may indicate an implied acknowledgment that consummation of the transaction is a condition to the finder's right to compensation.

[24] Except perhaps to not reveal the opportunity to others while the parties are negotiating.

[25] 162 Colo. 149, 425 P.2d 282 (1967).

the finder and his right to compensation, its opinion nevertheless touches upon or suggests the broad spectrum of problems of the legal status, rights, and obligations of a finder.

The facts, in brief, were as follows: Plaintiff Roberts was a broker in the oil and gas business and in this capacity learned that defendant Consolidated Oil & Gas, Inc. was interested in acquiring companies in the oil and gas business. In August of 1959, Roberts advised the officers of Consolidated of an oil company with whom Consolidated might merge, although he did not reveal the name of the company at that time. At Consolidated's request, Roberts submitted pertinent engineering data on the company and then informed Consolidated that the name of the prospect was Midland Oil Co. Consolidated did not ask Roberts to perform any further acts in connection with the transaction.

In the fall of 1960, approximately one year after Roberts disclosed the name of the company to Consolidated, the two companies merged on basically the same terms that had been proposed when Roberts first advised Consolidated of the opportunity. Roberts requested from Consolidated a reasonable "finder's fee" for his services in connection with the merger and commenced an action when his request was refused.

The court held that Roberts was entitled to recover on an implied contract basis,[26] since there was no express agreement between the parties and since the amount of compensation had not otherwise been agreed upon. The court was not overly specific as to the particular type of implied contract[27] which it determined had existed between Roberts and Consolidated, but it set out the following elements as essential to establishing the claim:

> The circumstances from which such a contract may be implied seem to be two; first, that the broker or agent has rendered services, and is permitted to do so in such a manner as to indicate that he expected to be paid for these services; and second, that the services are beneficial to the party sought to be made liable.[28]

Recognizing the duty to render services in order to be compensated, the court was faced with the issue of how much or what quantum of services to require. To this it was said:

> The measure of performance of an oil and gas broker or finder would seem to require only that he present a property available for acquisition and then procure any requested information needed to evaluate the

[26] *Id.* at 156, 425 P.2d at 286.

[27] *See* RESTATEMENT OF CONTRACTS § 5 (1933); Comment "a" refers to an express contract as being one the terms and existence of which are expressed verbally or in writing, an implied contract as one the terms and existence of which are expressed by the actions of the parties, and quasi contract as not being based upon apparent intention of the parties but created by law for reasons of justice. The latter two types of contracts are both *implied* but are based on different considerations!

[28] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 156-57, 425 P.2d 282, 286 (1967).

> property. His compensation is dependent upon the subsequent purchase, but not upon his efforts toward accomplishing the purchase.[29]

The last sentence makes it clear that the right to compensation is not dependent upon the quantum of services rendered, once the minimum requirement of making the opportunity available and providing requested information is met. It is also significant that this was only a finding of fact based upon evidence of the custom of the oil and gas industry[30] and presumably did not establish as a matter of law the amount of services required to be performed by finders in all instances, or even within the oil and gas industry itself.[31]

Even though the court only set out a minimum service requirement, it did add that for Roberts to be entitled to compensation there had to be a continuing connection between his services and the merger. To this point, citing cases involving claims for real estate broker's commissions, Consolidated asserted that Roberts did not prove that he was the "efficient agent" or "procuring cause" of the transaction.[32] The court rejected the argument that those requirements that are generally applicable to recovery of a real estate broker's fee applied to finder's cases. It said:

> [Those] [c]ases . . . relied on by the defendant, are not applicable here, for this is not the type of transaction where a broker, at the initial contact, produces a ready, willing and able buyer who purchases the property, upon the terms and at a price then designated by the principal. Those cases though do stand for the proposition, which is applicable here, that the broker must be the efficient agent or procuring cause of the sale. . . .
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> We discussed the rights of a so-called "finder" in George v. Dower, 125 Colo. 45, 55, 62, 240 P.2d 897 (1952) to the effect that he who is entitled to the commission is the one who sets the chain of events in motion which result in the sale.[33]

The term "procuring cause" suggests a primary or principal cause, but the court's explanation of this phrase — that a finder must set the "chain of events in motion which result in the sale" — suggests a lesser contribution by the finder. Again, the court was not clear but apparently felt that since Roberts had performed all the customary services required in the oil and gas industry, the services had suffi-

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[29] *Id.* at 158, 425 P.2d at 287.

[30] Custom of the industry is normally implied into every contract, and a fortiori, into every *quantum meruit* relation. *See* A. CORBIN, CONTRACTS §§ 631, 632, 653, 654 (1960); S. WILLISTON, CONTRACTS §§ 887(A), 887(AA) (3d ed. 1962).

[31] At some point custom may be judicially noticed, perhaps once a higher court has recognized the custom of an industry. Ultimately, requirements based upon custom may become statements of law.

[32] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 151, 425 P.2d 282, 286 (1967). Heady v. Tomlinson, 134 Colo. 33, 299 P.2d 120 (1956) and Babcock v. Merritt, 1 Colo. App. 84, 27 P. 882 (1891) were the cases relied on by Consolidated.

[33] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 157-58, 425 P.2d 282, 286 (1967).

ciently set the "chain of events" in motion.[34] According to this analysis, if the finder performs all services customarily required of finders in the same industry, and if the transaction is consummated, the "procuring cause" or "chain of events" requirement is a fortiori satisfied.[35]

Consolidated did not raise as error the trial court's determination that the requirement of benefit and the requirement that the services be rendered with a reasonable expectation of compensation were met.[36] Consequently, the Supreme Court's opinion does not specifically discuss these two elements, except to say generally that they were satisfied.[37]

The court closed with the following statement which appears to summarize the sole evidence needed to allow Roberts to recover his finder's fee:

> Clearly, no dispute existed as to the following facts: that Roberts brought Consolidated the deal; furnished all requested financial and engineering data; that a deal was made for a value in excess of that found by the trial court as the minimum; that that Goodstein, after being put in touch with defendant by Roberts, later dealt with the defendant through Straus.[38]

Roberts was awarded judgment in the amount of $30,000, based upon evidence that the usual (customary) commissions on a sale (or merger) up to $1,000,000 was 5%, although it might range from 3% to 15% with a scaled reduction on sales over $1,000,000.[39]

III. ELEMENTS OF A FINDER'S CAUSE OF ACTION

Although the factual setting of a finder's activities vary considerably, two factors must be considered in determining whether a finder is entitled to compensation: First, has the finder performed the services that are required of him; and second, have the events occurred (over which the finder may or may not have any control) which are conditions to his right to compensation?[40] The services the finder must perform and the other terms and conditions upon which a finder's compensation may be dependent may be set forth in an agreement between the finder and recipient of his services. If there is no agreement, the services to be performed by the finder and the other conditions

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[34] *Id.* at 158, 425 P.2d at 287.

[35] The court did not discuss, but from its use of the "procuring cause" or "chain of events" requirement presumably left open the possibility of intervening causes resulting in the consummation of the transaction. Thus, while the finder might perform all that is required of him by the custom of the industry, there might be a break in the chain of events such as to deprive him of his compensation.

[36] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 152, 425 P.2d 282, 284 (1967).

[37] *Id.* at 157, 425 P.2d at 286.

[38] *Id.* at 160-61, 425 P.2d at 288.

[39] *Id.* at 156, 425 P.2d at 284.

[40] One such condition evidenced by *Consolidated* is benefit. As will be discussed *infra*, benefit may also require the consummation of the transaction as well as a connecting link between the services rendered and the benefit bestowed.

precedent to his compensation, if any, are implied in law or fact under the legal theories of *quantum meruit* or implied contract. In either case the issues remain the same.

A. Agreement

Obviously, the finder and the persons to whom he renders services can agree upon the amount of, and conditions to, his compensation. This agreement can be oral, written, or implied in fact.[41] The parties may specifically define the services to be rendered by the finder, the dollar or percentage amount of the finder's fee, and/or the conditions, if any, to be attached to the payment of the fee. If such an agreement is made, it will be controlling, and the court will not imply any conditions or terms inconsistent with those expressed in the agreement.[42]

Similarly, if the conditions in the agreement are not satisfied, no recovery will be allowed, even though the finder has performed all services required of him by the agreement. This situation is illustrated by the case of *Scott v. Huntzinger*[43] which involved a claim by a real estate broker for a commission. The written agreement provided: "If the deal with White results in our sale of the property as provided in the agreement with him, then we will pay you a commission . . . ."[44] The "agreement" referred to gave White an option to buy certain property. White did not exercise the option but purchased the property from the defendant after the option expired. The Colorado Supreme Court held that the plaintiff was not entitled to a commission, stating, "the right of a broker to recover a commission depends upon the particular terms of the broker's employment."[45] The agreement between plaintiff and defendant provided that plaintiff's brokerage fee was contingent on White purchasing the land *under the option* to buy. Since the option was not utilized in buying the property, the broker was not entitled to compensation, even though he had performed all services required of him by the contract.

Similarly, as early as 1894 the New York court in *Knauss v. Gottfried Krueger Brewing Co.*[46] said:

> The record shows that there was evidence of the employment of the plaintiff for the mere purpose of bringing the possible buyer and

[41] Generally, finders' contracts do not need to be in writing. However, where the subject matter of the finder is within a statute of frauds and under the terms of a few statutes relating to employment contracts, a finder's contract must be in writing. *See* Annot., 24 A.L.R.3d 1160, 1168-70 (1969). Otherwise, recovery is available on an implied contract theory.
See generally Annot., 24 A.L.R.3d 1160, 1176 (1969). *See also* cases collected and discussed in Annot., *Validity, Construction and Enforcement of Business Opportunities or "Finder's Fee Contract,"* 24 A.L.R.3d 1160, 1168-70 (1969).

[42] *See* A. CORBIN, *supra* note 30, §§ 95-102, 556.

[43] 148 Colo. 225, 365 P.2d 692 (1961).

[44] *Id.* at 228, 365 P.2d at 693.

[45] *Id.* at 229, 365 P.2d at 695.

[46] 142 N.Y. Reports 70, 36 N.E. 867 (1894).

> seller together, and with the understanding that, if a sale were to result, the plaintiff was to have some compensation from the defendant for his services. The plaintiff testified that he was to have nothing to do with fixing the price or the terms of the sale; the principals were to do that part of the business; all he had to do was to bring them together, and if, through their subsequent negotiations, a sale should result, the plaintiff was to be entitled to some compensation.[47]

By agreement, if (1) the finder introduced the parties and (2) a sale resulted, the finder was entitled to the agreed compensation.

However, if the agreement is silent as to any conditions (other than the finder's services) to a finder's right of compensation, such conditions may nevertheless exist. The custom of the industry may impose conditions, and custom is normally a part of every contract, unless expressly excluded or unless inconsistent with the express terms of the contract.[48] The custom of finders in any particular sector of business may include conditions to his right to compensation. To the degree conditions are asserted when the written contract is silent, the law of *quantum meruit* and implied contract is applicable.

B. Quantum Meruit and Implied Contract

When there is no agreement as to the services to be performed or the conditions precedent to compensation, recovery may be dependent upon proof of a *quantum meruit* cause of action. The definitions of the courts suggest that the finder has no duty or responsibility other than revealing the opportunity, but the holdings often belie the definitions, and his right to compensation may well depend upon subsequent events.

The requirements for recovery by a finder in *quantum meruit* were set out in *Consolidated Oil & Gas, Inc. v. Roberts.*[49]

> [F]irst, that the broker or agent has rendered services, and is permitted to do so in such a manner as to indicate that he expected to be paid for these services; and second, that the services are beneficial to the party sought to be made liable.[50]

1. Services by the Finder

In most instances, the services that a finder must perform are questions of fact. *Consolidated* held that in the absence of agreement, the services that must be performed by a finder in order to be entitled to compensation are defined by custom in the industry.[51] In *Consolidated,* for example, the sole effort required of a finder in the oil and gas industry was "to present a property available for acquisition and

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[47] *Id.*

[48] *See* A. CORBIN, *supra* note 30, §§ 95-102, 556.

[49] 162 Colo. 149, 425 P.2d 282 (1967).

[50] *Id.* at 157, 425 P.2d at 286.

[51] *Id.*

then procure any requested information needed to evaluate the property."[52] It is implicit from the statement of facts that any duties created by requests for information may be defined by the person to whom the opportunity is revealed. And if a finder refuses to perform such further tasks, he may not be entitled to a fee or may receive a reduced fee.

While most finders are active in areas where there is considerable finder activity and, concomitantly, a finder custom, there seems no reason why a finder could not receive *quantum meruit* compensation for merely introducing parties or revealing an opportunity — subject to such conditions subsequent as may be imposed — if the finder were involved in an area in which no custom existed. Indeed, in the absence of a custom of the industry and in the absence of additional services being requested, the judicial definitions of a finder suggest such a conclusion, if the other conditions not related to the scope of the finder's services are fulfilled.[53] Further, while the issue of the services required of the finder in *Consolidated* was resolved as a finding of fact, other courts appear to have held as a matter of law that a finder's services may consist simply of revealing an opportunity.[54]

Yet according to *Consolidated,* the finder must also expect to be compensated for his services. With respect to this condition, it is usually sufficient that the person sought to be charged knew, or reasonably should have known, that the services were being rendered with the expectation of payment,[55] even though the person sought to be charged did not know that the party performing the services expected compensation and did not actually intend to pay for the services.

This requirement presents a special problem in finder's fee cases; for the typical *quantum meruit* case, the mere fact of performance of services and benefit to the recipient carries with it an implication or presumption that the services are rendered with the expectation of compensation, *i.e.*, people do not normally render services without

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[52] *Id.* at 158, 425 P.2d at 286.

[53] With respect to real estate brokers, the *quantum meruit* terms for recovery of compensation are well established, although these principles of law probably have their roots in the custom of the real estate business.

[54] *E.g.,* Lindeman v. Textron, Inc., 229 F.2d 273 (2d Cir. 1956); Crofoot v. Spivak, 113 Cal. App.2d 146, 248 P.2d 45 (1952); Seckendorff v. Halsey, Stuart & Co., 234 App. Div. 61, 254 N.Y.S. 250 (1931), *rev'd on other grounds,* 250 N.Y. 353, 182 N.E. 14 (1932). *But see* Towers v. Doroshaw, 5 Misc. 2d 241, 159 N.Y.S.2d 367 (Sup. Ct. 1957). A more complete discussion of the measure of recovery follows in a later section, but it should be noted here that the quantum of services has not to date been a significant factor in this decision.

[55] *E.g.,* Nagele v. Miller, 73 Ida. 441, 253 P.2d 233 (1953); Johnson v. Nasi, 50 Wash. 2d 87, 309 P.2d 380 (1957); *see* City Ice & Fuel Co. v. Bright, 73 F.2d 461 (6th Cir. 1934); Spencer v. Spencer, 181 Mass. 471, 63 N.E. 947 (1902); Poppa v. Poppa, 364 S.W.2d 52 (Mo. App. 1962); Kellogg v. Gleeson, 27 Wash. 2d 501, 178 P.2d 969 (1947); *cf.* Mills v. Sharpe, 129 Colo. 589, 272 P.2d 641 (1954); Millard v. Loser, 52 Colo. 205, 121 P. 156 (1912). *But cf.* Towers v. Doroshaw, 5 Misc. 2d 241, 159 N.Y.S.2d 367, 375-76 (Sup. Ct. 1957).

expecting compensation therefor.[56] However, the relationship of the parties may change this presumption.

For example, it is often held that where a family relationship exists between the performer and recipient, there is a presumption that compensation was not intended, the services being presumed to have been rendered gratuituously.[57] Perhaps such a presumption should be applicable to a finder's fee claim based upon *quantum meruit,* when the finder is claiming the fee from a business associate with whom he regularly or frequently deals on other types of business, or when the opportunity is volunteered without mention of, or agreement for, compensation. This presumption would be based upon a conclusion that many opportunities are revealed in the business world by business associates without any expectation of compensation for revealing such opportunity. In fact, the difficulties inherent in the claim for compensation by one who freely broadcasts or volunteers his knowledge of an opportunity and the multiple sources from which a person might learn of opportunities suggest the desirability of requiring that such agreements be in writing.

In any event, the relationship between the finder and the beneficiary may be determinative of the service requirement to a finder's *quantum meruit* case.[58]

2. Benefit to the Recipient

Often, however, the principal issue in a finder's claim for compensation is what constitutes benefit so as to entitle the finder to compensation. Knowledge of an opportunity, as knowledge of anything, may be benefit *per se.* If so, revealing an opportunity would satisfy the benefit requirement without more. Thus, the finder's services may consist only of revealing the opportunity, the definition of a finder's services and the benefit that must be received by the recipient being the same.

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[56] *E.g.,* Dieterle v. Gatton, 366 F.2d 386 (6th Cir. 1966), *appealed after remand,* 397 F.2d 155 (6th Cir. 1968); Ferber Co. v. Ondrick, 310 F.2d 462 (1st Cir. 1962), *cert. denied,* 373 U.S. 911 (1963); Meredith v. Marks, 27 Cal. Rptr. 737, 212 Cal. App.2d 265 (1963); Leoni v. Delaney, 83 Cal. App. 2d 303, 188 P.2d 765 (1948); Dixie Builders, Inc. v. Partin, 54 So. 2d 811 (Fla. 1951); Maui Aggregates, Inc. v. Reeder, 446 P.2d 174 (Hawaii 1968); Shurrum v. Watts, 80 Ida. 44, 324 P.2d 380 (1958); *In re* Winan's Estate, 77 Ill. App. 2d 462, 222 N.E.2d 546 (1966).

[57] *In re* Moyer, 190 F. Supp. 867 (W.D. Va. 1960); Russell v. Baumann, 239 Ark. 830, 394 S.W.2d 619 (1965); Wilson v. Equitable Sec. Trust Co., 52 Del. 353, 158 A.2d 281 (1960); Tanner v. Tanner, 106 Ga. App. 270, 126 S.E.2d 838 (1962); Morris v. Bruce, 98 Ga. App. 821, 107 S.E.2d 262 (1952); Shurrum v. Watts, 80 Ida. 44, 324 P.2d 380 (1958); Ferris v. Barrett, 250 Iowa 646, 95 N.W.2d 527 (1959); McDaniel v. McDaniel, 305 S.W.2d 461 (Mo. 1957); Doby v. Williams, 53 N.J. Super. 548, 148 A.2d 42 (1959); Porter v. Ferguson, 53 Wash. 2d 693, 336 P.2d 133 (1959).

[58] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 156-57, 425 P.2d 282, 286 (1967). *Consolidated* said that the finder must not only provide services but his relationship with the principal must be such as to justify a reasonable expectation of compensation on the part of the finder.

Yet the services and the benefit are not the same; for while knowledge is desirable, it is beneficial in a legal sense only when *used* by the recipient. Utilization of the information seems to be a condition precedent to a finder's compensation or a necessary part of the "benefit" requirement, even though his services may be completed when he reveals the opportunity. Hence, in any discussion of benefit, two other factors must be considered: the need for a connecting link between the services and the benefit, and the necessity for a consummated transaction.

a. Chain of Events or Procuring Cause

Obviously, there must be some connection between the finder's services and the benefit to the recipient of the services for recovery of a finder's fee on the theory of *quantum meruit. Consolidated* described this connection as a "chain of events" or the services as being the "procuring cause"[59] of the benefit and held that if the finder performed all that was required of him by custom or request and if the benefit was realized, the connection requirement was fulfilled.

Often, however, there can be such interruptions and intervening causes such as to deny the finder his fee. The issue and the approach to the resolution of the question of link or connection between the finder's services and the benefit obtained cannot be more precisely phrased than it was in *Consolidated.* When such circumstances arise, the issue can normally be resolved by the same principles as are applied by the courts in analogous situations involving brokers.[60]

b. Consummated Transaction

Perhaps the most critical facet of the benefit requirement — and perhaps a separate requirement in itself — is the need for a consummated transaction. Indeed, the author's research has disclosed no case in which a finder has recovered compensation if the opportunity revealed by the finder was not exploited. While the parties may contractually provide for a finder's fee regardless of the use made of

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[59] *Id.* at 157-58, 425 P.2d at 286: The law of brokers requires the broker to be the procuring cause of the sale. This procuring cause has been defined as the "effective cause" or the "predominating effective cause"; *see, e.g.,* Hayutin v. DeAndrea, 139 Colo. 40, 45, 337 P.2d 383, 385 (1959). *See also* Pass v. Industrial Asphalt of Calif., Inc., 239 Cal. App. 2d 776, 49 Cal. Rptr. 190 (1966): " 'Procuring cause' has been defined as the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of the employment." *Id.* 49 Cal. Rptr. at 195.

[60] In the real estate industry, if more than one broker is employed, the broker who is the first to present a ready, willing, and able party is entitled to the commission. *See* Pueblo v. Leach Realty Co., 149 Colo. 92, 368 P.2d 195 (1962). Of course, such rule should be subject to a finding of an uninterrupted chain of events. It is generally held that the broker is entitled to his commission if his client is the cause of the failure of the sale to be consummated. *See, e.g.,* Circle T. Corp. v. Crocker, 155 Colo. 263, 393 P.2d 744 (1964); Pueblo v. Leach Realty Co., 149 Colo. 92, 368 P.2d 195 (1962).

the information disclosed by the finder,[61] in the absence of such a contractual provision the exploitation of the opportunity by the recipient of the finder's information should be held to be a condition subsequent, implied by law or implied in fact to the right of a finder to compensation,[62] whether the action is *ex contractu* or *quantum meruit*.[63]

The importance of whether the consummation of the transaction is a condition to a finder's right to compensation lies in the mode of operation of a finder. Whereas a broker usually is specifically employed by a party for the purpose of a particular transaction, a finder often is employed by no one. The finder often simply approaches persons whom he feels may be interested in the opportunities of which the finder has knowledge. Often the finder is not revealing a specific proposal; he is revealing a very general concept of an opportunity. The transformation of this opportunity into a transaction may occur long thereafter, and the finder may have nothing to do with the transformation. Hence, a problem then arises, because the finder will often fail to state the terms of compensation prior to revealing the opportunity, and the "ready, willing and able" concept applicable to a broker's right to compensation can rarely be applied to a finder. In most instances, the finder's compensation must be tied to actual exploitation of the opportunity, without an exception for the failure of the exploitation due to the refusal or neglect of the party to whom the finder disclosed the opportunity.

The conclusion that utilization of the finder's information is normally a condition to a finder's right to compensation was reached by the New York court in *Towers v. Doroshaw*,[64] wherein plaintiff sought a finder's fee for merely telling the defendant of a merger opportunity which was never consummated.

> [T]he Court does not consider the question . . . whether, upon satisfactory proof of the promise so made, a party might be held liable to pay for the mere mention to him of a corporation or firm with which he might subsequently do business . . . . In no case cited by

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[61] With respect to real estate agents, COLO. REV. STAT. ANN. § 117-2-1 (1963) provides that no such agent shall be entitled to a commission for finding a purchaser "until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed on." No doubt this provision merely reflects prior case law. Query, could the parties make a contract contrary to the terms of COLO. REV. STAT. ANN. § 117-2-1 (1963)?

[62] An argument for finding the condition to be implied may be based on two theories: First, that there is an established custom in particular industries which would give the principal notice of the finder's expectation *upon consummation*; second, that common sense compels the conclusion that the consummated transaction is the benefit for which the principal must compensate the finder, the absence of which estoppes the finder from claiming compensation. *See* Towers v. Doroshaw, *supra* note 54.

[63] COLO. REV. STAT. ANN. § 117-2-1 (1963) provides:

> No real estate agent or broker shall be entitled to a commission for finding a purchaser who is ready, willing and able to complete the purchase of the real estate as proposed by the owner, until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon.

[64] 5 Misc. 2d 241, 159 N.Y.S. 2d 367 (App. Div. 1957).

> the plaintiff has there been enforced an obligation to pay compensation to a "finder" for the disclosure of the name alone, without an introduction or negotiations leading to an eventual transaction between the defendant and the buyer. Certainly, when such an agreement is not reduced to writing, the plaintiff must sustain his burden of establishing the contract by evidence of a quality and quantity sufficient to satisfy the court of a clear and unequivocal intention by the defendant to pay for the mere disclosure.[65]

In holding that the plaintiff could not recover in *quantum meruit* if the transaction proposed was not consummated, the court said: "A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success."[66] While generally the custom of the industry in which the finder operated would be the basis of the holding and the consummation of the transaction would be a condition subsequent implied in fact, [67] the result in *Towers* appears to be a conclusion of law, *i.e.*, a separate condition implied by law into the contract or into the *quantum meruit* relationship.[68]

Even in the absence of custom, the consummated transaction condition should be implied in law, unless there is evidence of circumstances showing an intention (or justification) of the parties that the finder would be paid for merely revealing the opportunity regardless of what transpired thereafter. Such constructive conditions, as defined by Corbin, are founded on grounds of justice, independent of expressed intention or consideration. [69] With respect to finders, it seems difficult to concede that the parties would have intended the finder to be compensated regardless of the outcome of the transaction if they had considered it,[70] since the sole purpose of the relationship between the finder and exploiter is to consummate the proposed transaction.

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[65] *Id.* at 249, 159 N.Y.S. 2d at 376.

[66] *Id.* at 252, 159 N.Y.S. 2d at 379, *quoting* Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 383 (1881).

[67] "In truth, usage is one of the agencies by which the law has been gradually formed and still is not only added to, but otherwise amended." That usage may harden by repeated decisions into such new rules of law as do not contradict any previously existing rule is, however, clearly stated. S. WILLISTON, CONTRACTS § 655 (3d ed. 1961). Perhaps the custom of consummation of the transaction as a condition to compensation has already become a part of the common law of finders' fees.

[68] Perhaps this conclusion is merely the result of sound logic and common sense. It seems highly unlikely that compensation to the finder would be agreed upon regardless of whether the information resulted in actual benefit to the obligor. However, the benefit should be defined in terms of exploitation of the opportunity rather than the amount of profits realized therefrom, although the latter fact may be highly important to the question of amount of compensation.

[69] *See generally* A. CORBIN, CONTRACTS §§ 631-32, 653-55 (1960).

[70] One might approach the issue by way of the commercial frustration doctrine. *See* RESTATEMENT OF CONTRACTS § 288 (1932). Ordinarily, both parties would assume the opportunity would be exploited, and if the promisor is unable to exploit the opportunity through no fault of his own, the objective has been frustrated. However, most often the failure of the exploitation is because of an inability to agree upon terms.

In rationalizing such an approach, some courts have implied the condition that the transaction be consummated by applying the principle that one must accomplish what he undertook to do in order to recover compensation for his services.[71] Applying this rule, a finder does not merely undertake to reveal an opportunity; he undertakes to obtain an advantageous transaction for another. Unless the opportunity revealed by the finder is exploited, the party to whom the opportunity is revealed has not obtained an advantageous transaction. While this approach results in the proper conclusion and while no doubt both parties to a finder's arrangement anticipate that it will culminate in an advantageous transaction, it is not precise to say the finder undertook to accomplish the advantageous transaction. At most, the finder undertook to present an advantageous transaction and, perhaps, to do what he could to assist the parties in consummating the transaction. The consummating of the transaction is ordinarily left to the parties involved.

Another way in which the consummated transaction is made into an implied condition is based on the "procuring cause" requirement, *i.e.*, the finder must have procured a consummated transaction or he is not entitled to compensation. The same conclusion can be reached in a *quantum meruit* case by a holding that no benefit has been received unless the recipient of the finder's disclosure utilizes the information to his benefit.

While the requirement of a consummated transaction can be based on several theories, perhaps it can best be explained by the doctrine of commercial frustration. Under this doctrine, it is held that

> [w]here the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.[72]

Thus, in the circumstances of a finder, exploitation of the opportunity or information is normally a desired object or effect which forms the basis of an agreement or *quantum meruit* relation upon which a finder's fee is asserted. This assumption is obviously logical, and unless the finder can prove a "clear and unequivocal intention by the defen-

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[71] Here, the difference between a broker and a finder may be most apparent. At the time a real estate broker, for example, comes on the scene, the deal that his principal wants is normally defined in specific terms. In the business of the finder, *e.g.*, corporate mergers, there is often only a vague concept of the terms upon which the "deal" could be consummated because of the sundry alternatives that can be followed to consummate a merger.

[72] RESTATEMENT OF CONTRACTS § 288 (1933). *See also* A. CORBIN, CONTRACTS §§ 1351-61 (1962).

dant to pay for the mere discloser,"[73] the finder's right to a fee should be held to be conditioned upon exploitation of the disclosure.

IV. Determination of the Fee

A. Agreement

If the parties have agreed upon the amount of the finder's fee, this is ordinarily conclusive.[74]

B. Quantum Meruit

Under the theory of *quantum meruit*, "reasonable compensation" is recoverable. Obviously, many factors are relevant to the determination of reasonable compensation. Therefore, no attempt will be made here to define the scope of evidence admissible on the issue of reasonable compensation,[75] except to point out that generally the type of evidence necessary to establish the amount of any *quantum meruit* claim should also be relevant to a finder's fee *quantum meruit* claim. Thus, the time spent by the finder, the skill of the finder, and the value of the subject

Although the usual evidence of reasonable compensation in a *quantum meruit* cause of action is relevant, it rarely provides much guidance to the determination of a reasonable finder's fee. The time spent and scope of services provided by the finder may provide some guidance, but it is difficult for such factors to be persuasive, since a finder is usually paid on a commission basis. Indeed, a finder's compensation, not unlike a lawyer's contingent fee, must compensate him somewhat for the failures for which he received no compensation as matter are all relevant to the determination of the value of the services. well as for his successes. Of course, if the fee is claimed, even though the opportunity was never exploited, consideration of factors such as time involved would be appropriate.

In either case, proof of customary finders' fees will normally be the mode of proving a reasonable fee. Evidence of fees customarily received for similar services is admissible to show the reasonable value of services rendered by the finder.[76] The admissibility of evidence of customary fees is based on the presumption that a fee would not attain

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[73] Thus, in the circumstances of a finder, exploitation of the opportunity of information is normally the desired object or effect which forms the basis of an agreement or *quantum meruit* relation upon which a finder's fee is asserted. This assumption is obviously logical, and unless the finder can prove a "clear and unequivocal intention by the defendant to pay for the mere disclosure," the finder's right to a fee should be held to be conditioned upon exploitation of the disclosure.

[74] When finder's fees are negotiated, relevant factors include the dollar size of the opportunity, the anticipated profit, and the scope of the services to be performed by the finder. However, often the agreed upon fee is merely a recognition of the finder's fee that is customary in the particular industry.

[75] *See, e.g.*, C. McCormick, Law of Damages § 46 (1935); A. Corbin, Contracts §§ 1004, 1112 (1964).

[76] Geiger v. Kiser, 47 Colo. 297, 305, 107 P. 267, 270 (1910).

the stature of custom if it were not reasonable. Evidence of customary fees is also admissible on the ground that custom is incorporated by law into every contractual or *quantum meruit* relationship. In *Fleming v. Wells*,[77] a case wherein the plaintiff sought to recover reasonable compensation for real estate broker services, the court said:

> The right of one rendering service for another to have their value estimated under a *quantum meruit* upon a basis of commissions can only arise out of a general custom, so that where such custom exists in reference to certain kinds of business, anyone actually or presumptively having knowledge of it, and employing the persons engaged in such business to perform services in their line without special contract, will be presumed to have done so with reference to such custom . . . .[78]

However, sometimes both of the parties will not be a part of the industry whose customary fees are sought to be used as evidence, and this is particularly true with respect to finders. The rule in this circumstance is that customary charges are evidence of reasonableness but are in no way conclusive.[79]

CONCLUSION

By reason of the informal manner in which most "finder" business is conducted, the scope of services to be performed by the finder and the terms upon which he is to be paid will usually not be expressed. Evidence of custom of the industry may be used to fill some of these gaps. However, often because of the difficulty of obtaining testimony of an industry's custom, or due to the absence of a custom in the industry, the gaps in a finder's arrangement cannot be filled in this manner. In such a situation, the courts should not hesitate to fill the gaps by applying logic and making their own determinations as to what the parties would have reasonably contemplated had they in fact considered these issues. Ultimately, as in the case of real estate brokers, many of the arrangements will be defined by law as a matter of law.

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[77] 45 Colo. 255, 101 P. 66 (1909).

[78] *Id.* at 259, 101 P. at 67; *cf.* Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 425 P.2d 282 (1967).

[79] Fleming v. Wells, 45 Colo. 255, 101 P. 66 (1909): "In an action for reasonable compensation by one employed to sell real estate and who effects the sale, but who is not regularly engaged in that business, evidence of the customary charges of real estate agents for such services is relevant, but such customary charges are not conclusive at fixing the compensation of the persons making such sale and such circumstances." *Id.* at 259, 101 P. at 67. *See also* 12 AM. JUR. 2d *Brokers* § 161 (1964); Morehouse v. Shepard, 183 Mich. 472, 150 N.W. 112 (1914).