REAL ESTATE AGENTS AND BROKERS—RECOVERY FROM A SELLER FOR TORTIOUS INTERFERENCE WITH A BROKER'S REASONABLE EXPECTANCY OF ECONOMIC BENEFIT MUST BE BASED ON A BROKERAGE AGREEMENT ENFORCEABLE UNDER THE STATUTE OF FRAUDS—*McCann v. Biss*, 65 N.J. 301 (1974).

On June 19, 1971, Steven and Joan Biss executed a contract for the sale of their home to Ernest and Elaine Wuester for $36,900, and title was later closed.[1] Nell McCann, trading as Nell McCann Realty, subsequently filed a complaint in the Bergen County District Court, naming the Bisses and the Wuesters as defendants.[2] Claiming that she had been the efficient cause of the sale, McCann sued for the commission allegedly due her.[3] At trial, the factual dispute focused upon the nature of the relationship between the sellers and the plaintiff, the significance of the actions of the plaintiff on behalf of the buyers or the sellers, and the legal ramifications of the relationship between the buyers and the plaintiff.[4] It was undisputed that there was neither a written real estate

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[1] McCann v. Biss, 65 N.J. 301, 307, 322 A.2d 161, 164 (1974).

[2] *Id.* at 303, 322 A.2d at 162.

[3] *Id.*

[4] *See id.* at 305-07, 322 A.2d at 163-64. Justice Hall, speaking for the court, noted that the confusing and contradictory testimony made it "exceedingly difficult to determine the full truth." *Id.* at 305, 322 A.2d at 163.

This is demonstrated by a summary of the events leading up to the litigation: Late in the spring of 1971 the Bisses ran advertisements in several local newspapers for the sale of their house in West Milford, N.J. These ads resulted in visits by a great number of prospective buyers (some accompanied by brokers) and brokers seeking to represent the Bisses. Apparently "[t]here were so many they could not differentiate between them and they generally did not ask who the visitors were." *Id.* at 303, 305, 322 A.2d at 162-63. One advertisement was seen by plaintiff's saleswoman, who testified that she telephoned Mr. Biss and attempted to negotiate an exclusive listing agreement, but that he would agree only to an open listing which merely grants the broker permission to produce an acceptable buyer. This arrangement was denied by Mr. Biss. *Id.* at 306, 322 A.2d at 163.

The plaintiff's saleswoman further testified that she later inspected the home with Mr. Biss and prepared a listing card quoting the asking price of $37,500 and the net price of $35,000. Mr. Biss denied this conversation. Mrs. Wuester testified that she was shown the house by the same saleswoman, but due to the number of visitors, the Bisses could neither confirm nor deny that testimony. It was also alleged by the plaintiff that a few days later, her saleswoman met with the Wuesters and that an offer was made by phone to Mr. Biss for $37,000, which he refused. This too was denied, but it should be noted that the Wuesters did not confirm the making of the offer or the phone call; it is not clear whether they were asked to so testify. *Id.* at 306-07, 322 A.2d at 163-64.

When the saleswoman called Mr. Biss a few weeks later, she was informed that the house had been sold, but Biss did not identify the buyers. It is not clear whether he was asked their identity. When Mrs. Wuester was called, she falsely told the plaintiff that she and her husband had decided to rent instead of buy. The Wuesters testified that during the subsequent negotiations between the two parties, Mr. Biss had stated that he did not want a

brokerage agreement signed by the Bisses, authorizing the plaintiff to represent them in the sale of their house, nor a written notice by the broker confirming an oral agreement, as required by section nine of the New Jersey statute of frauds.[5] It was established at the trial that Mrs. Wuester visited the Biss home accompanied by the plaintiff's saleswoman;[6] that Mr. Biss knew the plaintiff was interested in representing him;[7] and that the house was purchased by the Wuesters directly from the Bisses.[8]

In her suit, McCann attempted to establish liability in both contract and tort.[9] Plaintiff's allegation that the buyers had

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broker involved in the transaction. In the signed contract the Wuesters represented " 'that no broker brought about the sale of this property.' " *Id.* at 307, 322 A.2d at 164.

[5] *Id.* at 306, 322 A.2d at 163. *See* N.J. STAT. ANN. § 25:1-9 (1940), which provides in pertinent part:

> [N]o broker or real estate agent selling or exchanging real estate for or on account of the owner shall be entitled to any commission for such sale or exchange, unless his authority therefor is in writing, signed by the owner or his authorized agent, or unless such authority is recognized in a writing or memorandum, signed by the owner or his authorized agent, either before or after such sale or exchange has been effected . . . .
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> Any broker or real estate agent selling or exchanging real estate pursuant to an oral agreement with the owner of such real estate . . . may recover from such owner the amount of commission on such sale or exchange, if the broker or agent shall, within five days after the making of the oral agreement and prior to the actual sale or exchange of such real estate, serve upon the owner a notice in writing, setting forth the terms of the oral agreement . . . .

For a discussion of the development of statutes of frauds see notes 24-25 *infra* and accompanying text.

Both the plaintiff and her saleswoman knew the alleged listing agreement was not enforceable, and admitted that they had not complied with the five-day notice requirement. McCann v. Biss, 65 N.J. 301, 306, 322 A.2d 161, 163 (1974). Whether such an oral agreement is void, voidable, or unenforceable has not been answered with any consistency in New Jersey. *See* Harris v. Perl, 41 N.J. 455, 461, 197 A.2d 359, 363 (1964) (voidable); C. B. Snyder Realty Co. v. Nat'l Newark & Essex Banking Co., 14 N.J. 146, 165, 101 A.2d 544, 554 (1953) (unenforceable); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 591, 175 A. 62, 68 (Ct. Err. & App. 1934) (void). The *McCann* court termed the alleged contract between the broker and the sellers as both void and unenforceable. McCann v. Biss, 65 N.J. 301, 310, 322 A.2d 161, 166 (1974).

[6] McCann v. Biss, 65 N.J. 301, 306, 322 A.2d 161, 164 (1974). The plaintiff admitted that the Wuesters were not told of any agreement with the Bisses. *Id. But see* note 81 *infra*, regarding the constructive knowledge of a prospective purchaser that the broker will receive a commission if he is the efficient cause of a subsequent sale.

[7] McCann v. Biss, 65 N.J. 301, 306, 322 A.2d 161, 163 (1974). The Bisses, however, testified that no broker had been authorized to act for them in executing the sale. The supreme court was of the opinion that "they wished to sell the property themselves and did not desire the services of a broker." *Id.* at 305, 322 A.2d at 163.

[8] *Id.* at 307, 322 A.2d at 164.

[9] *Id.* at 303, 322 A.2d at 162. Since there had been no compliance with the statute of frauds, the count against the Bisses based on breach of contract was dismissed before the trial and no appeal was taken. *Id.* Another count against the Bisses, in quantum meruit, was likewise dismissed. *Id.* It has been held that a suit against a seller to recover for a broker's

breached an implied contract with her to complete the transaction was dismissed by the trial judge.[10] Claims were also brought against the buyers and the sellers in tort alleging that they had intentionally and unjustifiably "interfered with a reasonable expectancy of economic advantage or benefit on the part of the broker."[11] The latter was the only issue decided by the jury,[12] which found in favor of the buyers and against the sellers and awarded the plaintiff approximately six percent of the selling price of the house.[13]

The sellers appealed the tortious interference judgment against them, but the plaintiff did not appeal the judgment rendered in favor of the buyers on that issue. Plaintiff did, however, cross-appeal the dismissal of the implied contract claim against the buyer.[14] The appellate division sustained the judgment in favor of the buyers and reversed the judgment against the sellers as to tortious interference, remanding the cause for entry of final judgment.[15] The New Jersey supreme court granted the plaintiff's petition for certification[16] on the question whether the absence of a written seller-broker contract will prevent a real estate broker from bringing an action against a seller for tortious interference with the broker's prospective economic advantage.[17] Also certified was the

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services rendered pursuant to an oral agreement by bringing the action in quantum meruit is merely an attempt to evade the statute and will not be permitted. Leimbach v. Regner, 70 N.J.L. 608, 609, 57 A. 138, 138 (Sup. Ct. 1904). *See* 2 A. CORBIN, CONTRACTS § 416, at 438 (1950). *But cf.* Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 559, 236 A.2d 843, 859 (1967) (citing Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 67-68, 161 A.2d 725, 734 (1960)) (authorizing quantum meruit recovery from a buyer).

[10] McCann v. Biss, 65 N.J. 301, 303, 322 A.2d 161, 162 (1974). Another judge, however, had sustained the count alleging breach of implied contract by denying a pretrial motion for summary judgment made by the Wuesters. *Id.* at 312, 322 A.2d at 167.

[11] *Id.* at 303, 322 A.2d at 162.

[12] *Id.* The court expressed its displeasure with the "hardly adequate" instructions to the jury on the tortious interference claim, observing that the jury in *McCann* was not given enough information so that it could "intelligently and correctly apply the law to the facts." *Id.* at 303-04 n.1, 322 A.2d at 162.

[13] *Id.* at 303-04, 322 A.2d at 162.

[14] *Id.* at 304, 322 A.2d at 162.

[15] McCann v. Biss, No. A-539-72, at 4-5 (N.J. Super. Ct., App. Div., July 12, 1973).

[16] McCann v. Biss, 63 N.J. 582, 311 A.2d 5 (1973).

[17] McCann v. Biss, 65 N.J. 301, 304, 322 A.2d 161, 163 (1974). The *McCann* court noted that tortious interference is a "rather difficult tort." *Id.* at 303-04 n.1, 322 A.2d at 162. As explained by one court, there are two similar but separate torts which must be distinguished. In an action based on tortious interference with a contract or an existing business relationship, an underlying contractual expectancy must be shown, while an allegation of interference with a prospective economic opportunity or advantage entails no such requirement. Fitt v. Schneidewind Realty Corp., 81 N.J. Super. 497, 502-03, 196 A.2d 26, 29 (L. Div. 1963). *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 6.5-.11 (1956); W. PROSSER, THE LAW OF TORTS §§ 129-30 (4th ed. 1971).

question whether the appellate division erred in holding that no implied broker-buyer contract existed.[18]

The supreme court in *McCann v. Biss*[19] held that, "as a general proposition," a real estate broker who cannot recover a commission from a seller because of noncompliance with the statute of frauds cannot avoid the statute by suing the seller for "wrongful interference with the broker's reasonable expectancy of economic benefit."[20] It further held that, under the facts of this case, there was no implied contract between the buyers and the broker requiring the buyers to pay the commission if the broker could not legally collect from the sellers.[21] As to the sellers' liability, the court reasoned that since the "expected economic benefit" of a broker—his commission—is normally conditioned upon the existence of a valid written listing agreement, no action could lie for interference with that expectation when the agreement failed because of noncompliance with the statute of frauds.[22] As to the buyers' liability, the implied contract theory was said to be "patently frivolous" and

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These torts have usually involved interference by third parties, not by one of the parties to the transaction. *See, e.g.*, Schechter v. Friedman, 141 N.J. Eq. 318, 324, 57 A.2d 251, 254 (Ct. Err. & App. 1948) (distributor held liable for inducing manufacturer to breach contract with a competitor and sell to him instead); Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 760-61, 53 A. 230, 231 (Ch. 1902) (injunction granted restraining striking employees from inducing other employees to breach their contracts with employer).

[18] McCann v. Biss, 65 N.J. 301, 304, 322 A.2d 161, 163 (1974).

[19] 65 N.J. 301, 322 A.2d 161 (1974).

[20] *Id.* at 310, 322 A.2d at 165-66.

[21] *Id.* at 312-13, 322 A.2d at 167.

[22] *Id.* at 310, 322 A.2d at 166. The *McCann* court stated:

> "(2) If a statute provides that a person employing another for a specified purpose shall not be liable to the other for compensation although the other renders the promised performance, unless the employer has signed a memorandum in writing, a person has no duty to pay to another whom he orally employs for such purpose either the promised compensation or the reasonable value of services rendered."
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> Comment (b) . . . is particularly pertinent:
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> "b. Statutes similar to the one referred to in this Subsection are not infrequently enacted with reference to contracts with real estate brokers. The memorandum commonly required under such statutes is one which describes the thing to be sold and the terms of compensation. In the absence of such a memorandum, the employer, although benefited by the service of the agent who has been orally employed by him, is under no duty to give compensation *in any form.* * * *
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> The rule stated in this Subsection differs radically from that applying to the ordinary Statutes of Frauds. Its purpose is to protect against fraudulent claims for services; if the broker were entitled to obtain the value of services the statute would not have the effect intended. *Brokers are professionals; it is not unfair to deprive them of compensation if they do not adopt the safeguards of which they should be aware.*"

65 N.J. at 309-10, 322 A.2d at 165 (quoting from 2 RESTATEMENT (SECOND) OF AGENCY § 468 (1958)) (emphasis by court).

an overextension of a prior New Jersey decision which imposes a broker-buyer implied contract when the buyer wrongfully fails to complete his contract with the seller.[23]

The effect of section nine of the statute of frauds, which pertains to real estate brokerage contracts,[24] has been the basis of much litigation in New Jersey.[25] It has been judicially construed to have a twofold purpose: first, to protect sellers from fraudulent claims for commissions by real estate brokers; and second, to prevent real estate brokers from contracting for the sale of land unless their authority to do so has been expressed in a written instrument signed by the seller or his agent.[26]

Statutes of frauds in general have been severely criticized as outmoded.[27] Additionally, the New Jersey statute controlling real

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[23] 65 N.J. at 312-13, 322 A.2d at 167. *See* Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967). For a discussion of *Dobbs* as it relates to *McCann* see notes 80-84 *infra* and accompanying text.

[24] The section of New Jersey's statute of frauds governing real estate brokerage agreements was originally adopted in 1873, Law of March 13, 1873, ch. 215, § 1, [1873] N.J. Laws 50, *revised*, Law of March 27, 1874, § 10, [1874] N.J. REV. STAT. 301, and was twice amended. The first amendment allowed a broker to recover a commission as long as a writing was executed before or after the sale. Law of May 1, 1911, ch. 331, § 1, [1911] N.J. Laws 703. The second amendment established the five-day notice provision. Law of March 5, 1918, ch. 273, § 1, [1918] N.J. Laws 1020-21.

[25] *See* notes 53-74 *infra* and accompanying text.

Like all statutes of frauds, New Jersey's statute is based on the 1676 English statute [An Act for Prevention of Frauds and Perjuries, 29 Car. 2, c. 3 (1676)], which, although aimed at frauds and perjuries generally, included specific provisions regarding the conveyance of land, and indeed, appears to have been enacted because of the vast amount of fraud in that area. Hawkins, *Where, Why and When Was the Statute of Frauds Enacted?*, 54 AM. L. REV. 867, 869 (1920). The author stated:

> In fact, so many transactions of daily life were carried out without the aid of any writing that in order to prove any debt, the ownership of land, or to substantiate the validity of many contracts by unmistakable and indisputable evidence it became necessary to call for the testimony of eye witnesses, who had nothing to assist their memories outside of hazy recollections and could tell the jury something far different from the actual facts. Under such circumstances collusion, false swearing and actual fraud, perpetrated by subordination [*sic*] of perjury, was the general outcome, while the plaintiff in a case would get very little for his pains.

Id. (footnote omitted).

[26] Sadler v. Young, 78 N.J.L. 594, 597, 75 A. 890, 891 (Ct. Err. & App. 1910). The protections afforded to sellers, however, have on occasion been abused. For example, in Noonan v. Henry, 97 N.J.L. 447, 117 A. 393 (Sup. Ct. 1922), the court observed:

> This statute was enacted for the protection of the landowner. It, however, was frequently used by landowners to deprive brokers of commissions which they had rightfully earned.

Id. at 448-49, 117 A. at 394 (dictum). *See generally* Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 442-43 (1931).

[27] *See* Summers, *supra* note 26, at 441-42. This commentator asserted:

> The purpose of the statute is quite apparent, but it must be remembered that

estate brokerage agreements has been attacked as discriminatory, since there are no similar statutory provisions regulating other professions.[28] Despite these and other criticisms,[29] statutes of frauds relating to broker-seller agreements remain in force in many jurisdictions.[30]

Although under certain circumstances a broker may recover the value of his commission from a seller on tort grounds despite the requirements of section nine of the statute of frauds,[31] that statute bars recovery where the broker has grounded his claims specifically on interference with an oral contract. In *C. B. Snyder Realty Co. v. National Newark & Essex Banking Co.*,[32] the plaintiff broker entered into negotiations with the defendant bank and a

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conditions in 1677 were different from those of today. . . . [T]here is a steadily growing opinion that the statute has outlived its usefulness and should be repealed.

Id. (footnotes omitted). *Cf.* 3 S. WILLISTON, LAW OF CONTRACTS § 448, at 347 (3d ed. 1960), where reference is made to the statute of frauds in general as "warped and twisted by misconception and misapplication."

[28] *See* Lasser, *Real Estate Broker's Commission—Oral Agreements and the Statute of Frauds,* 10 RUTGERS L. REV. 410 (1955). Professor Lasser has mounted a particularly vehement attack on section nine of New Jersey's statute of frauds, calling it a "severe form of occupational regulation." *Id.* at 410. He "[c]ompare[d] the unfortunate position of the real estate broker with" that of the more fortunate securities broker who is "unhampered by a writing requirement." *Id.* at 412. Noting the importance of mutual trust between a broker and his client, he stated:

> Often a broker will not jeopardize his relations with the owner by suggesting that the commission agreement be in writing. When businessmen pride themselves on their integrity and ability to conduct their business with a handshake, they are insulted by the inference of a request that a commission agreement be reduced to writing.

Id. The author further emphasized that an unscrupulous seller could manipulate the statute of frauds to deprive a real estate broker of his commission:

> The owner of a desirable property can induce a real estate broker to perform his services and procure a sale. The owner may then remain behind the protective bulwark of the Statute of Frauds where he can force a settlement with the broker at a figure lower than the usual commission, or defeat the demand for commission entirely.

Id. at 412-13.

[29] *See, e.g.,* Stevens, *Ethics and the Statute of Frauds,* 37 CORNELL L.Q. 355 (1952). In this article Dean Stevens raised the ethical problems involved in the practical application of statutes of frauds in litigation. Specifically, he observed that the lawyer faces a dilemma when he knows an oral agreement exists, yet must plead the statute of frauds as a defense for his client at the expense of an innocent party—"[c]onscience tells him that the practice is wrong, but the literature from insurance companies reminds him of liability for malpractice." *Id.* at 356. The author further notes that "[t]he decisions and texts are replete with the statement that the statute was intended to be used as a shield, not a sword." *Id.* at 360.

[30] For a listing of those jurisdictions wherein the real estate agent's authority to act for the seller must be in writing see 3 S. WILLISTON, LAW OF CONTRACTS § 489A (1960).

[31] *See* text accompanying notes 42-60 *infra.*

[32] 14 N.J. 146, 101 A.2d 544 (1953).

prospective purchaser concerning the sale of the realty of the defendant building company, of which the bank was the majority stockholder.[33] Subsequently, the interested parties remolded the original proposal to sell the building company's realty into an arrangement to transfer its stock.[34] The gravamen of the plaintiff's claim was that, according to his agreement with the defendants, his commission would be earned upon the procurement of a firm offer for the stock, whether or not the sale was completed.[35] He obtained a firm offer, but was informed the next day by the defendants that a "better offer" had been received from another purchaser and had been accepted.[36] The broker sued in contract and in tort for his commission upon the ground that he had procured a purchaser for the stock or, alternatively, that he had initially obtained the prospective purchaser for the realty.[37]

At trial, the defendants were awarded summary judgment on all counts, and plaintiff appealed.[38] Having granted certification, the supreme court held that, as to the claims for commission based on the stock transaction, material issues of fact existed, and it reversed the grant of summary judgment.[39] However, as to the plaintiff's claim that he was entitled to recover a commission for his services relating to the originally proposed real estate deal, the court, agreeing with the judgment below, held that plaintiff was barred from contractual recovery because of noncompliance with section nine.[40] Further, since the claim in tort was based on alleged interference with that unenforceable contract, the court reasoned that to allow the tort claim would offend the spirit of the statute of frauds.[41]

In situations where the statute of frauds is not directly in issue,

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[33] *Id.* at 151, 101 A.2d at 547. The bank owned 85% of the building company's stock. *Id.*

[34] *Id.*

[35] *Id.* at 153-54, 101 A.2d at 548.

[36] *Id.* at 151, 101 A.2d at 547.

[37] *Id.* at 151-52, 101 A.2d at 547.

Plaintiff also sought quantum meruit relief, denial of which was affirmed by the supreme court. *Id.* at 152, 162-63, 101 A.2d at 547, 553.

[38] *Id.* at 150, 101 A.2d at 546.

[39] *Id.* at 163, 165, 101 A.2d at 553-54.

[40] *Id.* at 161-62, 164-65, 101 A.2d at 552, 554. The court observed:

> Although there are writings included in the record as exhibits, there is nothing advanced to show compliance by the plaintiff with R. S. 25:1-9 which is the statute of frauds relating to agreements for the payment of compensation in connection with real estate transactions.

Id. at 161-62, 101 A.2d at 552.

[41] *Id.* at 164-65, 101 A.2d at 554.

claims by real estate brokers based on tortious interference with their lawful business pursuits have been sustained. *Louis Kamm, Inc. v. Flink*[42] is representative of such situations. There, the plaintiff broker had brought an action against the president of a building and loan association (the seller) and two other brokers, all of whom allegedly were responsible for depriving him of his commission.[43] That portion of the action grounded in tortious interference alleged three wrongs: that after the plaintiff had confidentially disclosed to the president the identity of a prospective purchaser, the defendants acted in concert to induce the association to exclude the plaintiff from further negotiations;[44] that the defendants stole the plaintiff's customer; and that they " 'unlawfully, improperly and maliciously interfered with plaintiff's relation with' " the prospective buyer.[45] The Court of Errors and Appeals[46] held that, even in the absence of a "formal contractual relationship" between the broker and the association,[47] the action for unjustifiable interference with the business pursuits of the plaintiff did state a valid cause of action in tort.[48] The alleged acts of the defendants were viewed as an infringement upon the plaintiff's property right to pursue a business, and the court declared that "natural justice" would require a remedy in such circumstances.[49] Discerning overtones of "sharp dealing" by the defendants, the court noted that the allegations permitted an inference that the president of the association sought to gain a pecuniary advantage from his interference and that such motive evidenced malice.[50]

It is important to note that, although the president appears to have had the agency power to act for the association,[51] the latter

[42] 113 N.J.L. 582, 175 A. 62 (Ct. Err. & App. 1934).

[43] *Id.* at 583-84, 175 A. at 64-65.

[44] *Id.*

[45] *Id.* at 584, 175 A. at 65. One of the other brokers was the president's brother-in-law, and it was his firm which eventually received the commission from the subsequent sale of the property. *Id.* at 583-84, 175 A. at 64-65.

[46] The complaint had been dismissed by the Essex County circuit court as a sham and was brought on appeal to the Court of Errors and Appeals. *Id.* at 583, 175 A. at 64.

[47] *Id.* at 594, 175 A. at 69. Although it may be inferred that there was an oral brokerage agreement, the court does not clearly explain the exact relationship between the broker and the association.

[48] *Id.* at 584, 590-91, 175 A. at 65, 67-68.

[49] *Id.* at 586, 175 A. at 66.

[50] *Id.* at 595, 175 A. at 70. *Compare id. with* Weinstein v. Clementsen, 20 N.J. Super. 367, 374, 90 A.2d 77, 80 (App. Div. 1952), where a distinction can be seen between this type of activity and legitimate competitiveness.

[51] 113 N.J.L. at 595, 175 A. at 69-70. Although the owner of the property in this case was a building and loan association, the defendant Julius Flink, in his capacities as a director, president, and conservator of the association's property, appears to have had sufficient

was not named in the suit; the court seems to have dealt with all the defendants as third parties to the relationship between the association and the broker, commenting that even though the brokerage contract was void by reason of the statute of frauds, the defendants, as "strangers to the agreement," could not raise the statute as a defense.[52]

In addition to actions based on interference with economic advantage, brokers have successfully sued sellers on other tort grounds where there has been no written brokerage agreement. *Louis Schlesinger Co. v. Wilson*,[53] for example, concerned a seller who had deceived his broker by not disclosing that another party held a prior option on the real property being offered for sale.[54] The broker brought an action for his commission in contract and in deceit.[55] Reversing the trial court's dismissal of the action, the supreme court held that, although the brokerage agreement was oral and recovery on the contract was barred by the statute of frauds,[56] the case would be remanded because the business loss incurred by plaintiff due to defendant's allegedly deceitful representation stated an actionable claim.[57] The court commented that

> [t]he charge is not made to enforce the contents of the oral agreement but to compensate the plaintiff for its loss engendered by the deceit.[58]

It further indicated in dictum that in a proper case, where the deceit "permeate[s] the contractual relationship between the parties," it would consider the possibility of overriding the statute of frauds, thereby permitting *contractual* recovery in order to reach an equitable result.[59] Thus, in *Kamm* and *Schlesinger*, despite the absence or the failure of the underlying contract, the brokers were held to state an actionable claim because the defendants acted in a

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power to manage that property and to act as agent in the sale of the association's real estate assets. *Id.*

[52] *Id.* at 591, 175 A. at 68. The court never expressly discussed section nine of the statute, but since that is the only part of the statute of frauds pertaining to such real estate brokerage agreements, it must be presumed that it was that section to which the court referred.

[53] 22 N.J. 576, 127 A.2d 13 (1956).

[54] *Id.* at 578-79, 127 A.2d at 14-15.

[55] *Id.* at 579, 127 A.2d at 15.

[56] *Id.* at 584, 127 A.2d at 18.

[57] *Id.* at 586, 127 A.2d at 19.

[58] *Id.* at 585, 127 A.2d at 18. The parties stipulated the damages for deceit to be $7,200, but it should be noted that this figure was equivalent to what the plaintiff broker would have received as his commission under the oral contract. *See id.* at 579-80, 127 A.2d at 14-15.

[59] *Id.* at 584-85, 127 A.2d at 18.

manner inimical to their general business relationship with the brokers.[60]

This theory of allowing recovery based on the misconduct of the offending party applies in suits against the buyer as well. *McCue v. Deppert*[61] is representative of New Jersey cases[62] brought by brokers against buyers on the ground of tortious interference. In *McCue*, the buyer had falsely represented in the contract of sale that no broker had shown him the property.[63] After completion of the sale, the broker, who had an oral listing agreement with the seller, brought an action against the buyer based on "unlawful interference with plaintiff's business resulting in a deprivation of prospective or potential economic advantage."[64] The appellate division, reversing a summary judgment for the defendant buyer and remanding the cause to a jury,[65] held that the purpose of the statute of frauds is to protect the party to be charged, namely, the seller, and that the buyer, who was not involved in that agreement, could not rely on the unenforceability of the broker-seller contract to shield him from liability.[66] The court further held that the broker need not even show he earned a commission; it was sufficient to show that "except for the tortious interference by the defendant . . . plaintiff would have consummated the sale and made a profit."[67] Thus, where a buyer, who is not a party to the

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[60] The court in *Schlesinger* observed that the duty a broker traditionally owes to his principal is not a "one-way street," and that the principal-agent relationship imposes a duty of good faith *on the seller* as well as on the broker. *Id.* at 585, 127 A.2d at 18. *See* Sustick v. Slatina, 48 N.J. Super. 134, 144, 137 A.2d 54, 60 (App. Div. 1957), where the court stated:

> There can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances. Not only must defendants' motive and purpose be proper but so also must be the means.

Emphasis, however, is usually placed on the broker's fiduciary duty to his client. *See, e.g.*, Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 552-53, 236 A.2d 843, 856 (1967); Carluccio v. 607 Hudson St. Holding Co., 141 N.J. Eq. 449, 453-54, 57 A.2d 452, 454-55 (Ct. Err. & App. 1948). NATIONAL ASS'N OF REAL ESTATE BOARDS, CODE OF ETHICS art. 11 (1962) provides:

> In accepting employment as an agent, the Realtor pledges himself to protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the Realtor from the obligation of dealing fairly with all parties to the transaction.

But see Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1343-44 (1972).

[61] 21 N.J. Super. 591, 91 A.2d 503 (App. Div. 1952).

[62] *See* note 79 *infra* and accompanying text.

[63] 21 N.J. Super. at 594-95, 91 A.2d at 504-05.

[64] *Id.* at 595, 91 A.2d at 505.

[65] *Id.* at 598, 91 A.2d at 506.

[66] *Id.* at 596-97, 91 A.2d at 505-06.

[67] *Id.*

brokerage agreement, tortiously interferes with the broker's dealings, the court will place emphasis upon the broker's general business expectancy rather than upon the presence or absence of an enforceable contract.

The extent to which the New Jersey courts have disregarded the necessity of a contract in allowing recovery by a broker for tortious conduct of a buyer is clearly exemplified in *Harris v. Perl*.[68] In that case the court held that the broker could recover from the buyer despite the absence not only of a formal brokerage contract, but of any business relationship whatsoever with the seller.[69] The buyer in *Harris* had been shown the property by the plaintiff broker and had discussed price terms. The buyer subsequently learned that the purported owner had transferred title to his bank in satisfaction of a mortgage debt.[70] Plaintiff broker, however, was unaware of this situation and believed the apparent owner had authority to sell.[71] The buyer quickly made his offer directly to the bank and promptly signed a contract of sale, representing therein that no broker had shown him the property on behalf of the bank.[72] The broker brought suit against the buyer on the ground of tortious interference.[73] Although the facts indicated that plaintiff had neither a written contract with the purported seller nor any business relationship with the actual seller,[74] the New Jersey supreme court held that where a buyer deprives a broker of his commission by dealing directly with the seller, thereby "appropriat-

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[68] 41 N.J. 455, 197 A.2d 359 (1964).

[69] *Id.* at 464, 197 A.2d at 364.

[70] *Id.* at 458, 197 A.2d at 361.

[71] *Id.* at 459, 197 A.2d at 361.

[72] *Id.* at 460-61, 197 A.2d at 362. A representative of the buyer explained to the bank's attorney that the Perls had previously been shown the property by someone, but did not identify the plaintiff as that party. The result was that the standard clause wherein the buyer represents to the seller that no broker was involved, was changed to read:

> "The purchaser represents that at no time did any real estate broker show the premises to him *on behalf of Union County Trust Company*, the present owner, and so far as he has knowledge, no one is entitled to be paid real estate commissions on said sale."

Id. (emphasis added).

[73] *Id.* at 459, 197 A.2d at 361. The opinion does not state the precise nature of the plaintiff's claim against the buyer, but the language of the court implies that the action was based on tortious interference with a reasonable expectancy of economic advantage. *See id.* at 460-63, 197 A.2d at 362-64.

Plaintiff also sued the bank and the purported seller. *Id.* at 459, 197 A.2d at 361. The bank received summary judgment which was not appealed by the plaintiff, and the judgments of the lower courts in favor of the purported owner were affirmed by the supreme court. *Id.* at 459, 466, 197 A.2d at 361, 365.

[74] *Id.* at 458, 460, 197 A.2d at 361-62.

ing to himself the value of the services of the broker, he should pay for that mischief."[75] The court reasoned that the buyer had deceitfully prevented the broker from learning of the involvement of the bank,[76] and that, had the buyer fully infomed the bank of the broker's interest, it most likely would have engaged her.[77] *Harris* thus stands for the proposition that even where the broker has made no business contacts which would give rise to potential contractual benefits, the court will permit recovery for tortious interference with expectations of economic advantage where the offending buyer has breached fundamental tenets of "fair play."[78]

While most New Jersey cases dealing with this issue have grounded a broker's recovery from a buyer on tort theories,[79] the supreme court, in the landmark case of *Ellsworth Dobbs, Inc. v. Johnson*,[80] has indicated that in a proper situation it will also base a buyer's liability on a theory of implied contract. In that case the broker had found a satisfactory property for a prospective buyer who had solicited his services and who knew the broker would earn a commission from the sale. Although the seller and the buyer had agreed to the proposed terms of the sale, the buyer defaulted on the contract.[81] The supreme court held that in such a situation the law will imply a contract between the broker and the buyer, obligating the buyer to complete the transaction with the seller[82] so that

[75] *Id.* at 463, 197 A.2d at 364.

[76] *Id.* at 464, 197 A.2d at 364. For a discussion of deceit as applied to broker-seller cases see Louis Schlesinger Co. v. Wilson, 22 N.J. 576, 585-86, 127 A.2d 13, 18-19 (1956), discussed in notes 53-59 *supra*.

[77] 41 N.J. at 460-61, 464, 197 A.2d at 362-64.

[78] *Id.* at 464, 197 A.2d at 364.

[79] *See, e.g.*, Harris v. Perl, 41 N.J. 455, 197 A.2d 359 (1964); Myers v. Arcadio, Inc., 73 N.J. Super. 493, 180 A.2d 329 (App. Div. 1962); Sustick v. Slatina, 48 N.J. Super. 134, 137 A.2d 54 (App. Div. 1957); Geo. H. Beckmann, Inc. v. Charles H. Reid & Sons, Inc., 44 N.J. Super. 159, 130 A.2d 48 (App. Div. 1957); McCue v. Deppert, 21 N.J. Super. 591, 91 A.2d 503 (App. Div. 1952); Fitt v. Schneidewind Realty Corp., 81 N.J. Super. 497, 180 A.2d 25 (L. Div. 1963).

[80] 50 N.J. 528, 236 A.2d 843 (1967).

[81] *Id.* at 534-43, 558, 236 A.2d at 846-50, 859. The supreme court considered it "a matter of common knowledge" that a prospective buyer knows a broker will earn a commission from the sale. *Id.* at 558, 236 A.2d at 859.

[82] *Id.* at 558-59, 236 A.2d at 859 (citing Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 67-68, 161 A.2d 725, 734 (1960)).

A jury had found the buyer in *Dobbs* liable for the commission, but the judgment against him was reversed by the appellate division. The supreme court reversed that judgment and ordered a new trial based on the implied contract theory. 50 N.J. at 535, 562, 236 A.2d at 846, 861.

For an earlier discussion of the broker-buyer-seller relationship see Harris v. Perl, 41 N.J. 455, 197 A.2d 359 (1964), where the court explained:

The role of the broker is to bring buyer and seller together at terms agreeable to

the broker can receive his commission from the proceeds of the sale. If the buyer breaches the contract with the seller without good cause, he becomes liable to the broker for the commission based on the breach of the implied contract.[83] Although generally the broker's commission is extracted from the proceeds of the sale, in such a case of wrongful default by the buyer, the court will hold him responsible for compensating a broker who has in all respects done his job.[84]

The cases above demonstrate that, with the exception of a *Dobbs*-type *contractual* remedy, the general theory of recovery against either seller or buyer, absent an enforceable brokerage agreement, has focused upon the tortious conduct of the offending party as the basis for compensating the broker for his lost commission. *McCann* restricts the extension of this tort theory of recovery. As to seller liability, the court explained that at the root of any claims by a broker for tortious interference there must necessarily have occurred an injury to a contractual expectation cognizable

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both, and both know the broker expects to earn a commission from the seller if he succeeds. The broker's stock in trade is his knowledge of what property is or can be made available and who is or can be interested in a given parcel. The inherent uniqueness of each parcel distinguishes the real estate broker from the salesman of automobiles or cutlery, for the very act of identifying real property or the prospective purchaser is itself both a rendition of a valuable service and an opportunity for a dishonest man to make off with the broker's stock in trade.

Id. at 462-63, 197 A.2d at 363-64.

The major thrust of the holding in *Dobbs,* however, was the promulgation of a rule precisely defining the point at which the *seller* becomes liable to the broker for his commission when a valid brokerage agreement exists:

When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract.

50 N.J. at 551, 236 A.2d at 855. If the buyer defaults, the seller is not liable for the commission; but if the contract is not completed because of a "wrongful act or interference of the seller," the seller must pay the commission. *Id. Cf.* Stanchak v. Cliffside Park Lodge No. 1527 Loyal Order of Moose, Inc., 116 N.J. Super. 471, 479-81, 282 A.2d 775, 779-80 (App. Div. 1971), where the court held the seller liable even when a contract of sale had not been executed. *See generally* Note, *Ellsworth Dobbs, Inc. v. Johnson: A Reexamination of the Broker-Buyer-Seller Relationship in New Jersey,* 23 RUTGERS L. REV. 83 (1969).

[83] 50 N.J. at 559, 236 A.2d at 859. The court further asserted that damages would be equivalent to the lost commission, but if no percentage or specific amount had been contracted for, recovery would be in quantum meruit. *Id.*

[84] *Id.* at 558-59, 236 A.2d at 859. The buyer's implied contract with the broker in such a case is independent of the buyer's contract with the seller; thus, it is irrelevant whether or not the seller sues the buyer for breach—the broker may still seek his commission from the buyer. *Id.* at 556-57, 560, 236 A.2d at 858, 860. An exception to this general principle would occur when the seller successfully sues the buyer for a "substantial" sum. In this case, the seller is said to have received "payment representing the equivalent of performance," and would be liable for the commission. *Id.* at 557-58, 236 A.2d at 858-59.

under the statute of frauds. In the case of a contract rendered void and unenforceable because of noncompliance with the statute of frauds, a broker cannot avoid the statute by suing in tort.[85]

The court further asserted that the statute of frauds was enacted primarily to protect the seller, and it stressed the importance of placing the risk of loss on the broker.[86] Adopting language of the *Restatement (Second) of Agency*, the court noted that

> *"[b]rokers are professionals; it is not unfair to deprive them of compensation if they do not adopt the safeguards of which they should be aware."*[87]

Although the *McCann* court effectively limited the circumstances under which a broker may recover on tortious interference grounds, it did distinguish cases which had permitted the broker to recover in tort against the seller.[88] It reasoned that these cases involved "peculiar factual and legal situations" beyond the ambit of the issues presented in *McCann*.[89] For example, its analysis of *Schlesinger* specifically denominated the action there as one based on deceit, implying that the holding should be narrowly applied and would be inapposite to cases such as *McCann* where there was no evidence or allegation of deceit.[90] Another case, *Brenner & Co. v. Perl*,[91] serves to underscore the *McCann* court's concern with the

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[85] 65 N.J. at 310, 322 A.2d at 165-66. *But see* Sustick v. Slatina, 48 N.J. Super. 134, 137 A.2d 54 (App. Div. 1957), where the facts were similar to those in *McCann*, but the seller did not plead the statute of frauds as an affirmative defense. The appellate division sustained the judgment of the trial court against both sellers and buyers. Since the statute was not pleaded, the court could, as a matter of law, treat the brokerage agreement as valid and proceed unhampered by the restrictions of the statute. *Id.* at 138-41, 137 A.2d at 56-58. Discussing the liability of the seller in this case, the *Slatina* court stated:

> He knew plaintiff had a prospective purchaser, he promised him a commission, learned the name and address of the purchasers from him, but then acted in concert with the Slatinas for the purpose of profiting by the elimination of plaintiff's commission, without giving plaintiff a reasonable opportunity to bring the parties together at a mutually satisfactory price.

Id. at 145, 137 A.2d at 60.

[86] *See* 65 N.J. at 308-10, 322 A.2d at 165.

[87] *Id.* at 310, 322 A.2d at 165 (quoting from RESTATEMENT (SECOND) OF AGENCY § 468, comment *b*, at 399 (1958)) (emphasis by court). For additional text of that portion of the *Restatement* quoted by the court see note 22 *supra*.

[88] 65 N.J. at 310-11, 322 A.2d at 166.

[89] *Id.* at 310, 322 A.2d at 166.

[90] *Id.* at 311, 322 A.2d at 166. The court in *Schlesinger* stated the following elements as necessary for an action in deceit:

> [A] false representation, knowledge or belief by the defendant of the falsity, an intention that the plaintiff act thereon, reasonable reliance in acting thereon by plaintiff, and resultant damage.

22 N.J. at 585-86, 127 A.2d at 18. None of these elements was specifically found in *McCann*.

[91] 72 N.J. Super. 160, 178 A.2d 19 (App. Div. 1962). This was an appeal by the broker of a summary judgment in favor of the seller. *Id.* at 162, 178 A.2d at 20.

need for an underlying business expectation on the part of the broker based on a judicially enforceable contract. In *Brenner*, the broker was allowed to bring an action for recovery of his commission from a seller where, during the term of a valid listing agreement, there was an "unmistakable inference" that the sellers had induced the buyers to withhold their offer until the listing agreement expired, thus depriving the broker of his commission.[92] Although there could be no recovery on the expired contract,[93] the writing was evidence of a valid business expectation. As such, any wrongful interference with that expectation was deemed an actionable tort.[94]

It should be noted that *Kamm* was not discussed in the opinion in *McCann*, and was relied on solely for the premise that in "appropriate real estate brokerage matters" a claim for tort will lie.[95] While the *McCann* court viewed *Kamm* as the case authority for the general validity of such tortious interference actions, it apparently did not deem it necessary to reconcile the two cases.[96] Indeed, like *Schlesinger* and *Brenner*, *Kamm* serves to illustrate situations in which the application of the statute of frauds is deemed inappropriate.

As to buyer liability, the *McCann* court rejected the plaintiff's contention that the implied contract theory enunciated in *Dobbs* could be applied against the buyers.[97] Distinguishing that case, it

[92] *Id.* at 166, 178 A.2d at 22. The defendant had notified the plaintiff that he was going to advertise the house himself, whereupon the plaintiff sent him a list of persons who had been shown the house by plaintiff's personnel. He informed the defendant that he expected a six percent commission if the house were sold to any one of those persons. The name of the subsequent purchasers appeared on that list. In addition, the purchasers told the defendant that they had been there with the plaintiff's agent. *Id.* at 164-65, 178 A.2d at 21.

[93] *Id.* at 165-66, 178 A.2d at 22.

[94] The *Brenner* court did not state that its reasoning was based on interference with a business expectancy; but this may be inferred from its reliance on Louis Schlesinger Co. v. Rice, 4 N.J. 169, 179-82, 72 A.2d 197, 202-03 (1950), where the decision was couched largely in terms of malicious interference with the plaintiff broker's contract by the owner and another broker. *See* 72 N.J. Super. at 167-68, 178 A.2d at 22-23. *Compare* 4 N.J. at 179-82, 72 A.2d at 202-03 *with* Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 A. 62 (Ct. Err. & App. 1934), discussed in notes 42-52 *supra* and accompanying text.

[95] 65 N.J. at 303, 322 A.2d at 162.

[96] Although the issues in *Kamm* and *McCann* may appear alike, the circumstances surrounding the real estate transactions in the two cases were quite different. Specifically, all of the parties in *Kamm* were professionals who were familiar with real estate transactions. In addition, the conduct of the defendants in *Kamm* was alleged to have been particularly offensive. *See* 113 N.J.L. at 595, 175 A. at 69-70. Most important, all of the defendants in that case were viewed as strangers to the brokerage agreement, thus eliminating the need for a consideration of the effect of section nine. *See* note 52 *supra* and accompanying text. In *McCann*, only the plaintiff was a professional; the conduct of the defendants was not seen as being especially egregious, and the statute of frauds was the focal point of the litigation.

[97] 65 N.J. at 312-13, 322 A.2d at 167.

noted that *Dobbs* involved a valid brokerage agreement, a contract of sale effectuated by the broker, and default by the buyer. In contrast, these circumstances were absent in *McCann* and the seller was not legally bound to use or pay the broker. The court reasoned that the mere fact that the broker could not legally collect his commission from the seller did not in itself imply a promise to pay it by the buyer.[98]

In addition to its discussion of the implied contract approach to buyer liability, the court expressly endorsed cases holding a buyer liable in tort where his interference caused the broker to be excluded from the transaction and resulted in a wrongful pecuniary advantage to himself equivalent to the lost commission.[99] From those cases can be derived the proposition that the more closely the alleged advantage to the buyer approaches the amount of the broker's lost prospective commission, the more likely is the inference that the broker was excluded in order to reduce the purchase price by the amount of the commission.[100] To negative that inference a defendant buyer would contend that he gained nothing by excluding the broker because he would not have paid a higher price and the seller would not have accepted less. Such was the argument propounded by the buyers in *Harris*,[101] but there the court held that they could not "avoid real damages by raising an issue made hypothetical by [their] very wrong."[102] In *McCann*, the court was satisfied that the buyers did not gain a pecuniary advantage corresponding to the commission and that had a different price been demanded by either party "there would have been no deal."[103] It appears from this language that, even if the conduct of

[98] *Id.* The court commented that to hold the buyer liable under that theory would be a "grossly onerous and unfair obligation . . . absent an express agreement between buyer and broker to that effect." *Id.* at 313, 322 A.2d at 167.

[99] *Id.* at 313 n.4, 322 A.2d at 167.

[100] Such a situation was before the court in Sustick v. Slatina, 48 N.J. Super. 134, 137 A.2d 54 (App. Div. 1957), where the court noted that by comparing the ultimate net sale price with the original asking price the jury could have found that the plaintiff was deliberately excluded "so that the payment of a broker's commission might be eliminated." *Id.* at 143, 137 A.2d at 59. The situation may be inferred from the facts in Harris v. Perl, 41 N.J. 455, 458-59, 197 A.2d 359, 361 (1964) (buyer deliberately avoided contact with plaintiff broker, sending his hurried offer directly to the seller), and McCue v. Deppert, 21 N.J. Super. 591, 594-95, 91 A.2d 503, 504-05 (App. Div. 1952) (price lowered because buyer falsely told seller no broker was involved).

[101] 41 N.J. at 464-65, 197 A.2d at 364-65.

[102] *Id.* at 465, 197 A.2d at 365.

[103] 65 N.J. at 308, 322 A.2d at 164. The court stated emphatically:

> [T]his is not the usual case where a seller and buyer deal directly, despite the presence of a broker in the situation, and agree on a price which represents the seller's figure less commission.

the buyers had been in issue on appeal,[104] the court would have decided in their favor.

By carefully distinguishing prior cases and by couching its holding in terms of a "general proposition,"[105] *McCann* allows for flexibility so that in future similar cases, the statute of frauds will not stand as an absolute bar to equitable considerations.[106] Notwithstanding this potential flexibility, it is clear that the scope of seller liability has been significantly narrowed.[107]

The position of the court concerning buyer liability is not as well-defined. One of the explanations presented by the *McCann* court to distinguish *Dobbs* was the existence of a valid brokerage agreement in the latter case.[108] The court's treatment of this issue implies that the existence of a valid brokerage agreement is a precondition to an implied buyer-broker contract.[109] The *Dobbs* opinion, however, appears to impose no such requirement.[110]

Id. at 307-08, 322 A.2d at 164. This raises the question of whether the *McCann* court would have reversed the judgment in favor of the buyers if the pecuniary advantage had, by chance, corresponded to the amount of the expected commission. It should be noted, however, that because of the contradictory nature of the evidence, it is difficult to determine just how much money was saved by the exclusion of the broker. Apparently deeming *Harris*' rationale inapplicable, the supreme court in *McCann* declared that no pecuniary advantage was gained because "the sellers received the lowest net figure they were willing to accept and the buyers paid the highest price they would agree to." *Id.* at 308, 322 A.2d at 164. *Compare id. with* note 102 *supra* and accompanying text.

[104] No appeal was taken from the judgment in favor of the buyers on the tort theory. 65 N.J. at 308 n.3, 322 A.2d at 164.

[105] *Id.* at 310, 322 A.2d at 165-66.

[106] The supreme court has indicated that in a proper case equitable principles may temper the strict application of the statute of frauds. *See* note 59 *supra* and accompanying text.

[107] It might appear that the seller could be required to pay the broker indirectly—in a suit by a buyer for contribution as a joint tortfeasor. *See generally* W. PROSSER, THE LAW OF TORTS §§ 49-52 (4th ed. 1971). But New Jersey's Joint Tortfeasors Contribution Law [N.J. STAT. ANN. § 2A:53A-1 *et seq.* (1952)] has been construed to prohibit an action for contribution from a party against whom the injured person had no cause of action. *See, e.g.*, Sattelberger v. Telep, 14 N.J. 353, 367, 102 A.2d 577, 584 (1954). Thus, in a case where a broker has no cause of action against a seller insulated by the statute of frauds, it is unlikely that a buyer could successfully sue the seller for contribution even though the seller may have acted in concert with the buyer to deprive the broker of his commission.

[108] 65 N.J. at 312, 322 A.2d at 167. *See* 50 N.J. at 538-39, 236 A.2d at 848.

[109] 65 N.J. at 312, 322 A.2d at 167. The court, noting that in *Dobbs* there was a valid brokerage agreement, a contract of sale with a buyer produced by the broker, and default by that buyer, stated that *"under such circumstances"* a buyer-broker contract would be implied. *Id.* (emphasis added).

It is interesting to note that the plaintiff in *McCann* attempted to establish additional liability against the sellers by alleging that they had induced the buyers to breach their implied contract with her. The court, having found no implied contract to breach, rejected the theory. *Id.* at 313 n.5, 322 A.2d at 167.

[110] There, it was said that an implied contract existed

Thus, it is not clear whether the court is simply restating the facts of *Dobbs* in order to distinguish them from the facts of *McCann*, or whether it is distilling from *Dobbs* a rule that even in an implied contract action, a written brokerage agreement is needed as evidence of an enforceable contractual expectancy.[111]

Another issue left unsettled in *McCann* is the degree of pecuniary advantage which must accrue to the buyer in order to give rise to the presumption that the buyer dealt directly with the seller solely to deprive the broker of his commission. While *McCann* implies that to hold the buyer liable in such a case the pecuniary advantage must correspond to the commission,[112] no clear standard has been promulgated. Thus, pecuniary advantage, while it may serve as a useful indicator of buyer misconduct, cannot be viewed as a clear-cut test.

McCann v. Biss serves to warn real estate brokers and attorneys that a broker's suit against a seller for tortious interference with a prospective economic advantage will probably not be successful if the broker-seller agreement has not been reduced to a writing in conformance with the statute of frauds.[113] The *McCann* court has

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> when a prospective buyer solicits a broker to find or to show him property which he might be interested in buying, and the broker finds property satisfactory to him which the owner agrees to sell at the price offered, and the buyer knows the broker will earn commission for the sale from the owner . . . .

50 N.J. at 559, 236 A.2d at 859.

[111] This ambiguity raises the question: How would the *McCann* court decide a case identical to *Dobbs* in all respects, except for the existence of a written brokerage agreement? Since the court in *McCann* places so much emphasis on the broker's duty as a professional to obtain a written brokerage agreement upon which to base his business expectancy, it is probable that, were such a case to arise, the court would not hold the buyer liable, even though, as a stranger to the agreement, he could not raise the statute of frauds as a defense.

[112] *See* 65 N.J. at 313 n.4, 322 A.2d at 167.

[113] The National Association of Real Estate Boards has reflected a concern with the need for written brokerage agreements in its code:

> The Realtor, for the protection of all parties with whom he deals, should see that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties; and that copies of such agreements, at the time they are executed, are placed in the hands of all parties involved.

NATIONAL ASS'N OF REAL ESTATE BOARDS, CODE OF ETHICS art. 10 (1962). Conspicuously absent from the code, however, is any suggestion to the broker that a major reason for obtaining a written brokerage agreement is to protect himself.

The New Jersey Real Estate Commission currently lacks sufficient funds to enable it to apprise real estate brokers of recent developments such as the holding in *McCann*. It is expected, though, that when funds become available, the Commission will institute a system of dissemination of such information. Letter from John J. Regan, Secretary-Director of the New Jersey Real Estate Commission, to author, Dec. 24, 1974, on file at *Seton Hall Law Review*.

At least one local realty organization has informed its members of the *McCann* decision. *See* Lasser, *Realty News in the Courts*, THE REALTOR, Oct. 1974, at 3-5 (*The Realtor* is a monthly

not changed the law but has attempted to clarify the decisions in this area, and by its forceful reaffirmation of the statute of frauds, has taken the holding in *Snyder* one step further. In addition to *Snyder's* refusal to allow recovery for interference with an unenforceable brokerage agreement,[114] *McCann* now precludes a broker from recovering under the more general theory of interference with a prospective economic advantage, since the court will look beyond that claim for an underlying contractual expectation.

The *McCann* decision further insulates the real estate seller from liability and rejects a theory which would make the buyer a guarantor of the broker's commission. While brokers may view this as unduly restrictive, they need only comply with the provisions of section nine of the New Jersey statute of frauds in order fully to protect themselves.

Edmond M. Konin

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publication of the Real Estate Board of Newark, Irvington, and northern Hillside, New Jersey). After reviewing the facts and holding in *McCann*, the author stated:

> In the absence of a written brokerage commission agreement, the broker was thus in a position where it could not prevent the buyer and the seller from concluding the sale transaction, leaving out the broker.
>
> The conclusion and the moral is [*sic*] obvious.

Id. at 5. For the above author's earlier comments on the statute of frauds see note 28 *supra*.

[114] *See* notes 32-41 *supra* and accompanying text. The *McCann* court stated that its holding was "dictated and was foreshadowed" by its earlier opinion in *Snyder*. 65 N.J. at 310, 322 A.2d at 166.