ADMINISTRATIVE LAW — BROKERS: IOWA REAL ESTATE COMMISSION'S REGULATION, REQUIRING ALL LISTING AGREEMENTS TO BE IN WRITING, IS WITHIN THE ADMINISTRATIVE AGENCY'S DELEGATED AUTHORITY TO SAFEGUARD THE INTERESTS OF THE PUBLIC AND THUS RENDERS ALL ORAL LISTING AGREEMENTS VOID BY REPEALING IOWA'S COMMON LAW. *Milholin v. Vorhies* (Iowa 1982).

Gerald Vorhies listed his commercial building with Wolfe Real Estate in April, 1975.[1] After almost two months had elapsed the building had not been sold causing Vorhies to orally list his building with Milholin.[2] Upon obtaining Vorhies' listing, Milholin proceeded unsuccessfully to press for its sale until the fall of 1976, when he found an interested buyer in Philip Laux.[3] Milholin immediately conveyed Vorhies' offer to Laux, who in return made a counteroffer.[4] This counteroffer was presented to Vorhies, who promptly refused.[5]

Soon thereafter, Vorhies directly sold his commercial building to Laux at the sale price which Laux had bid in his counteroffer.[6] Upon Vorhies' acceptance[7] of Laux' counteroffer, Milholin sent a statement for his commission.[8] Vorhies responded in a letter, dated after the acceptance, that Milholin had not tendered him the requisite offer.[9] Consequently, Milholin filed a petition seeking his commission for the sale of Vorhies' property.[10] Vorhies affirmatively defended that the oral listing was violative of an Iowa Real Estate Commission's regulation requiring all listings to be in writing,[11]

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1. Milholin v. Vorhies, No. 15904-31-281, slip op. at 1 (D. Jefferson Co. May 13, 1981). The general listing agreement with Wolfe was oral, whereupon Vorhies set the asking price of his building at $56,000.00. *Id.* at 1-2. Though no commission was mentioned, Wolfe and Vorhies "knew it would be 5% because of previous dealings with each other." *Id.* at 2. During April, 1975, the standard commission in Jefferson County, Iowa, was assessed at 5%. *Id.*

2. *Id.*

3. *Id.* The finding of facts indicate that Vorhies "had known [Milholin] through their mutual church and in other ways for a number of years." *Id.* Also, during this transaction, Vorhies explained that should Milholin find a buyer, he would pay Milholin's commission as well as honor Wolfe's commission. *Id.* However, Vorhies' asking price was now $57,000.00 *Id.* In addition, the findings noted that 5% was Milholin's regular commission. *Id.*

4. *Id.* at 3. Laux' counteroffer was set at $56,000.00. *Id.*

5. *Id.* Vorhies had refused despite the fact that Milholin proposed to reduce his commission by 2% should Vorhies accept Laux' counteroffer at that time. *Id.*

6. *Id.*

7. *Id.* The findings of fact indicate that Laux took possession of the building in the fall of 1976. *Id.* Yet, the deed of conveyance had not been executed until May 24, 1977. *Id.* The Court adopted the former as the acceptance date. *See id.*

8. *Id.*

9. *Id.* at 3-4.

10. *Id.* at 4.

11. 700 IOWA ADMIN. CODE § 1.23(117) (1982).

and thus argued that the oral listing was devoid of any remedy.[12]

The district court awarded Milholin his real estate commission, pursuant to the oral listing agreement, on the theory that the Iowa Real Estate Commission was acting *ultra vires* in promulgating a regulation which was in derogation of Iowa's common law.[13] On appeal, the Iowa Supreme Court *held*, reversed.[14] The Iowa Real Estate Commission's regulation, requiring all listing agreements to be in writing, is within the administrative agency's delegated authority to safeguard the interests of the public and thus renders all oral listing agreements void by repealing Iowa's common law. *Milholin v. Vorhies*, 320 N.W.2d 552 (Iowa 1982).

In upholding a regulation requiring all real estate listings to be in writing, the *Milholin* decision reestablished a useful standard by which to discern whether an administrative agency is acting within the scope of its authority as delegated by the legislature.[15] Simply stated, the *Milholin* court maintained that an administrative agency acts within the scope of its authority in promulgating a regulation when, in consideration of the legislative intent and the language of its enabling clause,[16] a "rational agency could conclude that such a rule was within its delegated authority."[17] With such a standard so favorably oriented to empowering administrative agencies, *Milholin* represents the furthest extent over which Iowa's administrative agencies can exert their power.

While the *Milholin* decision stands as an embodiment of the emerging strength of Iowa's administrative agencies, it equally serves as a constraint by admonishing agencies as to the extent of their limited powers. Additionally, in abrogating the enforceability of an oral listing agreement — an agreement which had been enforceable at common law in Iowa[18] — it is not clear whether *Milholin* was applying or defying the standards and analysis it espoused. After the *Milholin* decision, what is clear is the rather nebulous state that oral listing agreements face in pending litigation.

In *Milholin* the Supreme Court of Iowa was presented with the issue of

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12. Milholin v. Vorhies, No. 15904-31-281, slip op. at 4 (D. Jefferson Co. May 13, 1981).

13. Milholin v. Vorhies, 320 N.W.2d 552, 553 (Iowa 1982).

14. *Id.* at 553, 554. The majority opinion was written by Justice McCormick. *Id.* at 553-55. Justice Uhlenhopp dissented and filed an opinion in which Justices LeGrand, McGivern and Larson joined. *Id.* at 555-56. Justice McGivern also wrote a separate opinion, dissenting, in which Justice LeGrand joined. *Id.* at 556-57.

15. *Id.* at 553, 554. The "rational agency" standard had previously been set forth in earlier Iowa cases. *See* Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d 907, 910 (Iowa 1979).

16. Legislative intent and the language of its enabling clause are excluded from the *Milholin* opinion. Such requirements, however, can be found in other opinions applying the "rational agency" test. *See* Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 910.

17. Milholin v. Vorhies, 320 N.W.2d at 554.

18. *See* McHugh v. Johnson, 268 N.W.2d 225, 227 (Iowa 1978) (citing Christensen v. Miller, 160 N.W.2d 509, 510 (Iowa 1968)).

whether a broker could be denied his commission, based on an oral listing agreement, in light of a regulation promulgated by the Iowa Real Estate Commission requiring "all listings to be in writing."[19] Crucial to this determination was whether the Iowa Real Estate Commission had the authority to adopt a regulation "abrogating the efficacy of oral listings."[20] In determining whether the agency's rule was within its delegated authority,[21] the *Milholin* court concluded that the "rule [was] presumed to be valid, and that the burden [was] on the person challenging it to demonstrate that a 'rational agency' could not conclude the rule was within its delegated authority."[22]

The emergence of the "rational agency" standard in determining whether an administrative agency had acted within the scope of its authority has enjoyed recent success.[23] In *Davenport Community School District*

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19. Milholin v. Vorhies, 320 N.W.2d at 553 (citing 700 IOWA ADMIN. CODE § 1.23(117) (1982).

20. Milholin v. Vorhies, 320 N.W.2d at 553.

21. *Id.* Subsumed in this notion of "delegation" and absent from the *Milholin* opinion is the collateral issue of whether the authority delegated to the Iowa Real Estate Commission was constitutionally permissible. In *Milholin*, the standard by which the Iowa Real Estate Commission was to regulate revolved upon the "protection of the public". *Id.* at 554. In upholding the regulation on other grounds, the *Milholin* court may have indirectly sanctioned legislative delegations based on the vague standard of "for the protection of the public." Such an interpretation is in opposition to holdings reached by other states. *See, e.g.*, Bell Telephone Co. v. Driscoll, 21 A.2d 912 (Pa. 1941). In support of the *Milholin* court, attention should be focused upon *Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311 (Iowa 1968). In *Elk Run* Iowa's Supreme Court noted that "presence or absence of procedural safeguards" embedded within a delegation play an important part in determining the delegation's validity. *Id.* at 317. Since the Iowa Real Estate Commission is bound by such safeguards as the following: to provide hearings on charges upon notice, to have the Committee preside over hearings, and to provide for judicial review in accordance with Iowa's Administrative Procedure Act, the delegation may presumably be proper. Indeed, in *Elk Run*, a delegation to Iowa's Commerce Commission was held proper on account of similar procedural safeguards. *See id.* at 317.

22. Milholin v. Vorhies, 320 N.W.2d at 554. Moreover, this standard was further limited in that an administrative agency's regulation would not be allowed if it were in contravention of the language of its enabling act and its legislative intent. *See* Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 909.

23. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 908-09 (1975). Considered the originator of the "rational agency" standard, Professor Bonfield noted the scope of review by the Committee and the Attorney General under section 17A.4(4)(a) of the Iowa Administrative Code. *Id.* at 908. Although there are four grounds upon which a rule, promulgated by an administrative agency, may be subject to objection, Professor Bonfield concluded that there were actually only two: "unreasonableness" and "otherwise beyond the agency's authority." *Id.* Thus, according to Bonfield, when reviewing a rule it must first be determined whether the rule lacks a reasonable basis so as to become violative of the due process clause. *Id.* at 909. This can be decided by questioning whether a "rational agency could believe that the rule is related to achieving a legitimate purpose within the agency's authority." *Id.* In that case the rule is proven reasonable. *Id.* Should it be desired to discern whether the rule is "beyond the authority delegated to the agency," the question simply becomes: whether

v. Iowa Civil Rights Commission,[24] the "rational agency" standard was used by the Iowa Supreme Court to validate a regulation promulgated by Iowa's Civil Rights Commission,[25] which awarded payment to teachers who had not been previously compensated for their absences due to pregnancies during the school term.[26] Similarly, in *Hiserote Homes, Inc. v. Reidemann*,[27] the "rational agency" standard was invoked to invalidate a Job Service rule[28] which allowed unemployment benefits to be received by the employee, despite the fact that the employer had made prior compensation of backpay.[29]

Nevertheless, the application of the rational agency standard to oral listing agreements presented several collateral issues and numerous strains of argument among the *Milholin* court. Among such issues was the determination of whether the common law could be changed by a regulation promulgated by an administrative agency.[30] To this, the Iowa Supreme Court responded with a simple affirmative,[31] citing as authority *Iowa Civil Liberties Union v. Critelli*.[32]

In *Critelli*, Iowa's Supreme Court examined certain rules of practice which were adopted by the Fifth Judicial District and made applicable to Iowa's criminal and civil procedure.[33] Of chief concern was the addition of Rule 26(F), which settled various time constraints for pre-trial motions in criminal cases in Polk County.[34] In affirming the constitutionality of such a practice, the court noted that the courts had inherent power to make rules concerning the practice and procedure of civil and/or criminal actions, originating from common law.[35] Such reliance on common law was not unusual, for common law has always played a compelling role in Iowa's history.[36] The *Critelli* opinion, however, appended constraints on the usage of

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the "agency could believe that an otherwise fair rule was within the scope of the expressed or implied statutory power granted the agency." *Id.* Noting the similarity between the words "beyond the authority delegated to the agency" as expressed in section 17A.4(4)(a) of the Iowa Administrative Code and "in excess of statutory authority" in section 17A.19(8)(b), the Iowa Supreme Court considered that a like analysis of these sections should prevail. *See* Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 910.

24. 277 N.W.2d 907 (Iowa 1979).

25. *Id.* at 909 (citing 240 IOWA ADMIN. CODE § 4.10 (1972)) (repealed 19__).

26. Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 908-10.

27. 277 N.W.2d 911 (Iowa 1979).

28. *Id.* at 913, 915 (citing 370 IOWA ADMIN. CODE § 4.13(2)(c) (1977)) (rescinded effective Dec. 5, 1979).

29. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d at 912-15.

30. Milholin v. Vorhies, 320 N.W.2d at 553.

31. *Id.*

32. 244 N.W.2d 564 (Iowa 1976).

33. *Id.* at 566.

34. *Id.*

35. *Id.* at 568.

36. *See* O'Ferrall v. Simplot, 4 Iowa 381 (1857).

common law.[37] Generally, these constraints would occur where the common law had been repealed or changed, whether by constitution or statute, or where conditions had changed so tremendously that the common law principle was "not founded in reason, or [was] not consonant with the genius and manner of the people."[38] More important, however, was the *proviso* the court added to its treatment of common law: "Constitutional or statutory provisions do not repeal the common law by implication unless the intention to do so is plain."[39]

The *Milholin* court's reliance on *Critelli* in discerning whether common law could be changed by an administrative agency's regulation seems unfounded. In *Milholin*, the regulation promulgated by the Iowa Real Estate Commission requires "all listing agreements to be in writing."[40] Should a violation of this regulation occur, the Iowa Real Estate Commission has the power to exercise several options. Conduct found in contravention of this regulation can result in the Iowa Real Estate Commission suspending the broker's license, revoking it[41] or taking other disciplinary action in light of its enabling statute.[42] Since the Iowa courts have permitted recovery on oral brokerage agreements at common law,[43] and since the intention of this regulation is not clear as to the remedies and enforceability of oral contracts, it may logically be concluded that damages should be paid to the broker in the form of his commission,[44] whether based on contract or quantum meruit.

In support of the *Milholin* opinion, however, is the equally persuasive argument that a law regulating for the public good is generally remedial, and as such should be construed liberally.[45] Since the ultimate purpose of the Iowa Real Estate Commission's regulation is to protect the public,[46] it should be construed liberally to offset the broker's claim.[47]

It has been contended, and the *Milholin* majority has confirmed, that the administrative regulation may be used as an affirmative defense by individuals, rather than as a basis of action by the agency itself, in those cases

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37. 244 N.W.2d at 568.

38. *Id.*

39. *Id.* (citing Fabricius v. Montgomery Elevator Co., 254 Iowa 1319, 1327, 121 N.W.2d 361, 366 (1963); Goodwin v. Thompson, 2 Greene 329 (Iowa 1849)).

40. 700 IOWA ADMIN. CODE, § 1.23(117) (1982).

41. IOWA CODE § 117.29 (1981).

42. IOWA CODE § 117.18 (1981).

43. *See, e.g.*, McHugh v. Johnson, 268 N.W.2d 225 (Iowa 1978).

44. Such a stance is similar to the district court's treatment of the issue. *See* Milholin v. Vorhies, No. 15904-31-281, slip op. at 4-10 (D. Jefferson Co. May 13, 1981).

45. Johnson County v. Guernsey Ass'n of Johnson County, 232 N.W.2d 84, 86-87 (Iowa 1975) (involving the validity of a statute passed for the protection of the public, forbidding the sale of unpasteurized milk to final consumers).

46. IOWA CODE §§ 117.29(3)-.34(8) (1981).

47. Despite the persuasiveness of this argument, it remains absent from the *Milholin* opinion.

involving a suit for commission.[48] Should the regulation have been made to protect the public from dubious claims made by brokers, a proposition which the *Milholin* court readily accepted,[49] then to not allow the regulation to be used as an affirmative defense against the regulated broker would nullify the efficacy of the regulation.[50]

After *Milholin*, it cannot be denied that the Iowa Real Estate Commission's regulation can be used as an affirmative defense. Yet, to allow it to prevail is a different matter altogether. Since the regulation was promulgated to protect the public from dubious claims made by a broker, its applicability should be limited to that instance.[51] Where, as in *Milholin*, a legitimate claim has been found, the regulation should not prevail as an affirmative defense provided that fraud on the part of the seller can be proved by the broker.

The court in *Milholin* also was presented with the question of whether the Iowa Real Estate Commission had the authority to promulgate a regulation requiring all listing agreements to be in writing.[52] Essential to this determination was whether a "rational agency could conclude that such a regulation was within its delegated authority."[53] An additional argument prompted by the "rational agency" standard results from plaintiff-broker's contention that the rules and regulations pertaining to real estate brokers are limited to a licensing act.[54]

Indeed, Iowa's Real Estate Commission possesses the power to issue[55] or reissue[56] brokers' licenses, revoke or suspend them where "unethical conduct [has been] harmful or detrimental to the public"[57] and demand a level of competency of its applicants by requiring examination.[58] Instead of categorizing these regulations as a mere licensing act, however, the Supreme Court of Iowa has always referred to them as an embodiment of regulatory law, vesting "far-reaching authority to license, regulate and discipline brokers and salespersons."[59] By examining certain sections of the regulations,[60] the

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48. Gaudio, *The Iowa Law of Real Estate Brokerage*, 30 DRAKE L. REV. 437, 461 (1980).

49. 320 N.W.2d at 554. The dissent also shared the view that the regulation was promulgated to protect the public. 320 N.W.2d at 556 (McGivern, J., dissenting).

50. *See supra* note 48 and accompanying text.

51. A comparable argument was made in Justice McGivern's dissent: "a seller of real estate cannot use the statute to effect a fraud on the realtor." Milholin v. Vorhies, 320 N.W.2d at 556 (McGivern, J., dissenting) (quoting Frash v. Eisenhower, 376 N.E.2d 1201, 1204 (Ind. Ct. App. 1978)).

52. Milholin v. Vorhies, 320 N.W.2d at 553.

53. *Id.* at 554.

54. *Id.* at 553.

55. IOWA CODE § 117.15 (1981).

56. IOWA CODE § 117.28 (1981).

57. IOWA CODE § 117.29(3) (1981).

58. IOWA CODE § 117.20 (1981).

59. Milholin v. Vorhies, 320 N.W.2d at 554 (discussing Pound v. Brown, 258 Iowa 994, 998, 140 N.W.2d 183, 186 (1955)). *Contra* Marcotte Realty and Auction, Inc., v. Schumacher,

Milholin court determined that the "overriding purpose of the statute [was] to protect the public."[61] In discerning whether a "rational agency" is empowered to promulgate such regulatory laws as are consistent with the provisions provided by the legislature,[62] the court remained divided.

The majority in *Milholin* asserted that since Iowa's Real Estate Commission was responsible for regulating broker conduct under the aegis of public protection, then the regulation requiring listing agreements to be in writing was a rational way to ensure its furtherance.[63] The dissenting position in *Milholin* maintained that although the Iowa Real Estate Commission may issue and reissue, and revoke or suspend a broker's license, regulating oral listings between brokers and sellers cannot be deemed to be carrying out and administering regulations consistent with the provisions provided by the legislature.[64] Although the point of divergence between the majority and the dissent may be rather troublesome, it was their point of convergence which was disconcerting, for both the majority and dissenting opinions of the court treated the regulation as a Statute of Frauds regarding brokerage agreements.[65]

The Iowa Supreme Court has held that the purpose of the Statute of Frauds was to defeat attempts of fraud and perjury in the proof of certain oral contracts.[66] Such contracts include: those made in consideration of marriage; those wherein one person promises to answer for the debt, default or miscarriage of another; those for creation of transfer of any interest in land; and those that are not to be performed within one year.[67] It was to this list that the *Milholin* decision appended oral listing agreements.

Oral listing previously had not been covered by the Statute of Frauds. As early as 1859, the Supreme Court of Iowa held that "an agreement to procure a conveyance of lands by another, is not a contract within the Statute of Frauds, and may be proven by parol."[68] Because a listing between a broker and a seller was normally not "for the creation or transfer of an interest in land,"[69] no property rights were created in or transferred to the broker. It was a contract which could be "performed in a year,"[70] since a

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225 Kansas 193, 589 P.2d 570 (1970).

60. Iowa Code § 117.29(3), .34(8) (1981).

61. 320 N.W.2d at 554. The dissent also shared the view that regulation was enacted for the protection of the public. 320 N.W.2d at 556 (McGivern, J., dissenting).

62. Iowa Code § 117.9 (1981).

63. 320 N.W.2d at 554.

64. *Id.* at 555, 556 (Uhlenhopp, J., dissenting) (citing Iowa Code § 117.9 (1981)).

65. *Id.* at 554. In his dissent, Justice McGivern noted that brokers could now be singled out with a special statute of frauds. *Id.* at 556 (McGivern, J., dissenting).

66. Fairall v. Arnold, 226 Iowa 977, 984-85, 285 N.W. 664, 667-68 (1939).

67. Iowa Code § 622.32 et. seq. (1981).

68. Bannon v. Bean, 9 Iowa 395 (1859).

69. Iowa Code § 622.32 (1981).

70. *Id.*

buyer may be found before one year. Additionally, it was not "a contract for the sale of goods,"[71] since goods have been defined not as services but as moveables.[72]

By its decision in *Milholin* the Iowa Supreme Court has sanctioned and extended the applicability of the Statute of Frauds onto brokerage agreements. This application of the Statute of Frauds as a reasonable exercise of governmental authority results in little controversy among other jurisdictions. Out of the twenty-two states which require the listing (or some part thereof) to be in writing,[73] only one state has held that the broker is entitled

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71. *Id.*

72. IOWA CODE § 554.2105(1) (1981).

73. Gibson v. W.D. Parker Trust, 22 Ariz. App. 342, ____, 527 P.2d 301, 302-04 (1974) (where despite the fact that a broker detrimentally relied upon the representations of the seller's agent, the court found the doctrine of estoppel to be inapplicable to statute which required real estate listings to be governed by the statute of frauds); Keely v. Price, 27 Cal. App.3d 209, 211-15, 103 Cal. Rptr. 531, 532-35 (1972) (statute requiring listing agreements to be in writing extended to deny a broker his commission from defendant-purchaser, who orally agreed to pay plaintiff's commission in order that seller would lower his asking price); Hossan v. Hudiakoff, 178 Conn. 381, ____, 423 A.2d 108, 108-09 (1979) (denying broker's commission on grounds that the written listing agreement did not contain addresses of all parties involved in transaction, in contravention of statute providing that no actions on written contracts could commence unless the contract met specified requirements); Mister v. Thompson, 114 So.2d 507, 507-08 (Fla. Dist. Ct. App. 1959) (though broker had procured a buyer who was ready, willing and able to purchase the estate, his suit for commission was devoid of remedy since no listing agreement had been signed by either of the sellers who held the estate as an estate by the entirety); Marshall Bros. Inc. v. Geisler, 99 Idaho 734, ____, 588 P.2d 933, 934-36, 938-39 (1978) (where broker availed in a suit for commission against land developers even though one of the developers had not been a party to the broker's contract; developer qualified as duly qualified representative under statute requiring signature of representative to a written contract for commission to make such a contract valid); William S. Deckelbaum Co. v. Equitable Life Assurance Society of U.S., 419 N.E.2d 228, 232 (Ind. Ct. App.), *modified on other grounds*, 422 N.E.2d 301, 302 (Ind. Ct. App. 1981) (denying a broker his commission because any reliance upon a seller's oral representations would, as a matter of law, be unreasonable, pursuant to statute imputing to broker the knowledge that listing agreements must be in writing); Marcotte Realty & Auction, Inc. v. Schumacher, 225 Kansas 193, ____, 589 P.2d 570, 574 (1979) (where real estate commission's regulation requiring listing agreements to be in writing was struck down as an *ultra vires* activity; thus, if broker obtained an oral listing, he would be entitled to agreed commission where contract was fulfilled); Louisville Trust Co. v. Monsky, 444 S.W.2d 120, 120-22 (Ky. 1969) (disallowing broker's claim for quantum meruit in absence of a written contract as provided by statute); Aetna Mortgage Co. v. Dembs, 13 Mich. App. 686, ____, 164 N.W.2d 771, 773-74 (1968), *reh'g denied*, (requiring that an agreement for commission, pursuant to statute, must be in writing is a valid extension of the statute of frauds under the state's police powers); Meech v. Cure, 165 Mont. 49, ____, 525 P.2d 546, 546-48 (1974) (summarily dismissing a broker's claim for commission where, though broker did not have a written listing agreement, defendant's executor promised that he would "petition the court" should purchase be consummated); Svoboda v. De Wald, 159 Neb. 594, ____, 68 N.W.2d 178, 181-83 (1955) (statute requiring written agreements satisfied where there are separate written agreements consisting of a purchase agreement signed by the procured purchaser, a receipt of the down payment signed by the broker, both witnessed by disinterested persons, and a written statement signed by the broker and the seller reciting terms contained in the purchase agree-

to maintain an action based on an oral contract.[74] Yet, despite the requirement of a written agreement in these jurisdictions, in only Kansas and Vermont has the statute arisen from the exercise of administrative authority.[75]

The majority in *Milholin,* extolling the proposition that a regulation analogous to the Statute of Frauds could be applied to broker's agreements,[76] relied upon the case of *Green Mountain Realty, Inc. v. Fish.*[77] In *Green Mountain,* the Supreme Court of Vermont struck down petitioner's claim for commission pursuant to a Vermont Real Estate Commission's regulation requiring all listings to be in writing.[78] In 1969, the Vermont legislature empowered the Vermont Real Estate Commission "to adopt, amend, and revise as it deems necessary, reasonable rules consistent [herewith],[79] in order to carry out and effectuate its purposes."[80] In viewing the Statute of

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ment); Led-Mil of Nevada, Inc. v. Skylard Realty and Ins., Inc., 90 Nev. 72, ____, 518 P.2d 606, 607-08 (1974) (denying broker's recovery, whether on the basis of an oral agreement or on quantum meruit, pursuant to statute which required listing agreements to be in writing and that recovery on quantum meruit would defeat the efficacy of this statute); Louis Schlesinger Co. v. Wilson, 22 N.J. 576, ____, 127 A.2d 13, 14-18 (1976) (sustaining a motion to dismiss against a broker who sought recovery for his commission upon an oral contract in contravention of statute requiring written authorization by owner or authorized agent that broker is entitled to any commission); Carney v. McGinnis, 68 N.M. 68, ____, 358 P.2d 694, 694-96 (1961) (disallowing broker's claim for commission on the ground that the written listing did not contain the amount of commission in contravention of statute); Blair and Co. v. Weininger, 155 N.Y.S.2d 203, 204-05 (1956) (statute of frauds would be a complete affirmative defense to broker's claim for commission on an express contract); Cohen v. P.J. Spitz Co., 121 Ohio St. 1, ____, 166 N.E. 804, 804-06 (1929) (applying statute of frauds not only to agreements made between the seller and the broker, but also extending its application to those oral agreements involving a broker and a third-party); Trumbly v. Fixley, 178 Or. 458, ____, 168 P.2d 571, 571-72 (1946) (sustaining defendant's demurrer to petitioner's claim for commission, since written agreement between them failed to sufficiently describe the property sold, contrary to statute); Taylor v. Neal, 467 S.W.2d 197, 198-99 (Tex. Civ. App. 1971) (voiding broker's right to commission pursuant to a statute which required commission agreements to be in writing); Barnhard v. Hardy, 77 Utah 218, ____, 293 P. 12, 3-15 (1930) (excluding plaintiff's claim for commission despite the fact that it had been in writing, pursuant to state law, because performance had only been partially completed); Green Mountain Realty, Inc. v. Fish, 133 Vt. 296, 336 A.2d. 187, 189-90 (1975); Koller v. Flerchinger, 73 Wash.2d 857, ____, 441 P.2d 126, 126-28 (1968) (denying broker's right to recovery, since he failed to perform conditions precedent set forth in the contract, and as such no valid contract between plaintiff and defendant was made, and thus, claim was barred by statute of frauds); Raskin v. Hack, 16 Wis.2d 296, ____, 114 N.W.2d 483, 484-85 (1962) (disallowing broker's claim for commission because, while written memorandum contained the names of the seller and buyer, it merely referred to plaintiff as "the broker" and was thus violative of statute).

74. Marcotte Realty & Auction, Inc. v. Schumacher, 225 Kansas 193, 589 P.2d 570, 575 (1979).

75. *See supra* note 73 and accompanying text.

76. 320 N.W.2d at 554.

77. 133 Vt. 296, 336 A.2d 187 (1975).

78. 133 Vt. at 296, ____, 336 A.2d at 188-90.

79. VT. STAT. ANN. tit. 26 et seq. (1975).

80. VT. STAT. ANN. tit. 26, § 2254 (1975).

Frauds thereafter enacted, the Supreme Court of Vermont noted the wisdom of a rule, which has as its purpose the establishment of "fair dealings with the parties," the standardization of procedure and practices in real estate matters, and the prevention of fraud, all for the protection of the public.[81]

The majority in *Milholin* also cited *Marcotte Realty & Auction, Inc. v. Schumacher,*[82] which presented a contrary view. In *Schumacher* the Kansas Supreme Court struck down a Kansas Real Estate Commission's regulation requiring listing agreements to be in writing.[83] In extending the grant of authority only to the issuance of licenses and the adoption of regulations consistent solely with licensing authority, the Kansas court never mentioned "public purpose." Rather, the court noted that the regulation was promulgated long after, and in contradiction of, case law which had already been developed in the area.[84]

Similar to the regulation in *Schumacher,* the Iowa Real Estate Commission's regulation was promulgated long after case law which had been fully developed.[85] Similarly, the adoption of such a regulation was to further the purposes and objectives of its enactment.[86] Unlike the Kansas court's interpretation of its statute in *Schumacher,* one of the objectives specifically mentioned in Iowa's enabling statute was to "safeguard the interest of the public."[87] Such was enough to convince the majority in *Milholin* that the "real estate commission could reasonably believe" that its regulation was within its delegated authority.[88] The dissent, on the other hand, after evaluating all the provisions within Chapter 117, felt *Schumacher* was controlling.[89]

In sanctioning the enactment in *Milholin,* the dissent noted that the majority had extended the application of the Statute of Frauds to a purpose that was seemingly unintended by the Iowa Real Estate Commission: use of

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81. Green Mountain Realty, Inc. v. Fish, 133 Vt. at ____, 336 A.2d at 189 (1975).

82. 225 Kan. 193, 589 P.2d 570 (1979).

83. *Id.* at ____, 589 P.2d at 571-74.

84. *Id.* at ____, 589 P.2d at 571-75. However, the Kansas statute now explicitly uses the terms "to safeguard the interests of the public." *See* KAN. STAT. ANN. § 58-3039(e) (Supp. 1981). The commission, prior to granting an original license, shall require proof that the applicant has a good reputation for honesty, trustworthiness, integrity, and competence to transact the business of the broker or salespersons in such manner as to safeguard the public interest. *Id.* Note also that the prohibited acts in which a broker may not engage can be construed to safeguard the public's interest. *See* KAN. STAT. ANN. § 58-3062 (Supp. 1981). Because *Schumacher* does not involve these newly promulgated statutes the decision remains of questionable validity.

85. The Iowa Supreme Court had previously recognized the validity of oral brokerage agreements at common law. *See* McHugh v. Johnson, 268 N.W.2d 225, 227 (Iowa 1978).

86. IOWA CODE § 117.9 (1981).

87. IOWA CODE § 117.29(3), .34(8) (1981).

88. 320 N.W.2d at 554.

89. *Id.* at 555, 556 (Uhlenhopp, J., dissenting).

such a regulation by a seller of real estate to effect a fraud on the broker,[90] if sufficient proof could be proffered.

To support its proposition, the dissenting opinion cited *Frash v. Eisenhower*,[91] an Indiana case which was concerned with the issue of whether a fraud had or had not been effected on a broker. In deciding *Frash*, however, the Indiana court relied heavily on the earlier case of *Hatfield v. Thurston*.[92] In *Hatfield* a broker had procured a purchaser to buy the seller's property.[93] Subsequently, when the purchaser wanted to change the terms the seller refused, retained the purchaser's money, informed the broker to keep out of the transaction, and proceeded to negotiate a sale with the purchaser two days afterward.[94] Such an instance was discerned as effecting a fraud on the broker by the Indiana Appellate Court.[95] In *Frash v. Eisenhower*, however, it was the broker who cancelled the sale, returned the money to the purchaser, and abandoned negotiations between the buyer and the seller.[96] These acts constituted no effect of fraud unto the broker, according to the Indiana court.[97] The dissent, however, cited to *Frash* for the language that "a seller of real estate cannot use the statute to effect a fraud on the realtor."[98] The *Milholin* dissent thus alluded to the possibility that such was the situation in the *Milholin* real estate transaction.[99]

In addition, the *Milholin* dissent pointed out that a broker should be entitled to restitution in the form of quantum meruit for the services he rendered[100]—this even assuming that the Iowa Real Estate Commission had statutory authority to abrogate oral contracts in derogation of the common law and that the regulation could withstand scrutiny in those instances in which its purposes are not being effectuated.

The law in Iowa is unequivocal concerning the fact that complete performance of an oral contract takes the contract out of the Statute of Frauds.[101] Moreover, a broker completes his performance and thus is entitled to earn his commission, in any of the following ways: by obtaining a binding contract as agent under the authority of the principal; by procuring a purchaser to whom the sale has been made; and by procuring a purchaser

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90. *Id.* at 556 (McGivern, J., dissenting) (citing Frash v. Eisenhower, 376 N.E.2d 1201 (Ind. Ct. App. 1978)).
91. 376 N.E.2d 1201 (Ind. Ct. App. 1978).
92. 87 Ind. App. 541, 161 N.E. 568 (1928).
93. *Id.* at ____, 161 N.E. at 569.
94. *Id.*
95. *Id.*
96. 376 N.E.2d at 1204.
97. *Id.*
98. *Id.*
99. 320 N.W.2d at 557 (McGivern, J., dissenting).
100. *Id.*
101. Halstead v. Rohret, 212 Iowa 837, 838-42, 235 N.W. 293, 294-95 (1931) (plaintiff awarded damages resulting from oral contract providing for a conveyance of land in return for rendering nursing services).

who is ready, willing and able to purchase on the terms required by the seller.[102] There was little dispute in the opinion that Milholin had procured Laux, to whom the sale had been made, and as such Milholin may have been entitled to restitution.[103] The problem with this result, however, is that it is in opposition to the prevailing trend which denies recovery on the theory of quantum meruit to a broker where the regulation requires the listing to be in writing.[104]

The courts which have denied recovery on quantum meruit have done so either because the particular statute rendered the contract unenforceable or to allow the remedy would have nullified the purpose for which the statute had been enacted.[105] A statute providing that any agreement authorizing

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102. Gatton v. Stephen, 239 N.W.2d 159, 161 (Iowa 1976) (citing Ducommun v. Johnson, 252 Iowa 1192, 1196, 110 N.W.2d 271, 273 (1961)).

103. Milholin v. Vorhies, 320 N.W.2d at 557 (McGivern, J., dissenting). The dissent pointed out that the petition had been based on an express contract, not quantum meruit, and determined that the court's "decision should be without prejudice to plaintiff's right to attempt to obtain a reasonable commission fee from defendant on a quantum meruit basis." *Id.*

104. *See infra* note 105 and accompanying text.

105. Valkama v. Harris, 575 P.2d 789, 792 (Alaska 1978) (an award of quantum meruit to broker would undermine statute); Beazell v. Schraber, 59 Cal.2d 577, ____, 30 Cal. Rptr. 534, 536-37, 381 P.2d 390, 392-93 (1963) (barring broker's claim for services rendered pursuant to a regulation providing in part: "[t]he following contracts are invalid . . . : [a]n agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation"); Iaguirre v. Echevarria, 96 Idaho 641, ____, 534 P.2d 471, 474-75 (1975) (denying recovery of broker's claim under quantum meruit due to statute requiring written contract for commission); Gerardot v. Emenshiser, 363 N.E.2d 1072, 1074-77 (Ind. Ct. App. 1977) (prohibiting recovery of broker's services under statute); Louisville Trust Co. v. Monsky, 444 S.W.2d 120, 120-22 (Ky. 1969) (disallowing broker's claim for quantum meruit in absence of written contract as provided by statute); Ekelman v. Freeman, 350 Mich. 665, 87 N.W.2d 157, 158-60 (1957) (granting a motion for summary judgment against a broker by noting that Michigan's Statute of Frauds precludes broker's recovery on the basis of quantum meruit); Reilly v. Maw, 146 Mont. 145, ____, 405 P.2d 440, 442-45 (1965) (denying broker's claim of quantum meruit where he had no written listing agreement in contravention); Property Sales, Inc. v. Irvington Ice Cream and Frozen Arts, Inc., 184 Neb. 17, ____, 165 N.W.2d 78, 78-81 (1969) (holding that expired brokerage contract could not be extended by parol evidence showing performance under Statute of Frauds); Led-Mil of Nevada, Inc. v. Skyland Realty and Ins. Inc., 90 Nev. 72, ____, 518 P.2d 606, 607-08 (1974) (denying broker's recovery on quantum meruit, pursuant to statute which requires listing agreements to be in writing and that recovery under quantum meruit would defeat the efficacy of the statute); Leimbach v. Regner, 70 N.J.L. 608, ____, 57 A. 138, 138-39 (1904) (determining that broker's claim for commission under the theory of quantum meruit was an attempt to evade statute which imposed a statute of frauds onto brokerage listings); Harris v. Dunn, 55 N.M. 434, ____, 234 P.2d 821, 821-27 (1951); Samit v. Knapp, ____ Misc. 2d ____, ____, 144 N.Y.S.2d 164, 164-65 (1955) (denying recovery pursuant to New York's Personal Property Law); Hornback v. Sabin Robbins Paper Co., 27 Ohio App. 329, ____, 161 N.E. 213, 214-15 (1927) (prohibiting recovery for services rendered by broker under quantum meruit as required by statute); Landis v. W.H. Fuqua Inc., 159 S.W.2d 228 (Tex. Civ. App. 1942); Heyman v. Adeack Realty Co., 102 R.I. 105, ____, 228 A.2d 578, 579-82 (1967) (disallowing broker's claim for reasonable value of services and expenses, despite the fact that broker had procured a buyer pursuant to an oral listing agreement); Baugh v. Darley, 112 Utah 1, ____, 184 P.2d 335, 340 (1947) (stating that Utah's statute precluded plaintiff-broker from asserting a

a broker to sell lands for a commission shall be void, unless such an agreement is in writing,[106] is an example of a statute intended to render void oral agreements. Should quantum meruit be applied, the statute would absolutely be nullified since it declared that every agreement for a commission would be void if not in writing.[107] Such inclusions are absent from the regulation involved in *Milholin*. The Iowa Real Estate Commission's regulation requires "all listing agreements to be in writing."[108] No indication is made that a commission based on an oral contract is void, or that an award in quantum meruit would threaten the efficacy of the statute.

Indeed, the *Milholin* dissent cited *Wunschel Law Firm, P.C. v. Clabaugh*[109] for the proposition that Iowa had previously allowed a suit based on commission to be obtained, without prejudice, on the basis of quantum meruit where valuable services had been performed and where such services were not illegal.[110] In *Wunschel*, the defendant had entered into a contingent fee contract with the plaintiff-lawyer to secure representation in a defamation suit.[111] This contingent fee contract, relating to "the defense of an unliquidated tort damage claim,"[112] was to be based upon a certain percentage of the difference between the prayer for damages and the amount actually awarded.[113] In holding such a contract void for contravening public policy the court entered its decision without prejudice accruing to plaintiff's right to secure a reasonable fee based on quantum meruit.[114] The dissent in *Milholin* noted that the court should follow its own precedent by allowing Milholin the right to obtain his commission on the quantum meruit basis[115] since he had performed reliable services and such services were not illegal.

Although the principles in *Wunschel* were not directly addressed by the majority opinion in *Milholin*, an argument can be made for the position that

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claim of unjust enrichment); Engelson v. Port Crescent Shingle Co., 74 Wash. 424, ____, 133 P. 1030, 1031-33 (1913) (holding that a letter offering compensation should plaintiff-broker procure a buyer fell outside statute governing oral brokerage listings); Leuch v. Campbell, 250 Wis. 272, ____, 26 N.W.2d 538, 538-39 (1947) (holding that no implied contract could result where statute specifically required listing agreements to be in writing).

106. N.M. STAT. ANN. § 75-143 (1941) (*construed in* Harris v. Dunn, 55 N.M. 434, ____, 234 P.2d 821, 824 (1951)).

107. *See* Featherman v. Kennedy, 112 Mont. 256, ____, 200 P.2d 243, 245 (1948). Other examples include: *Landis v. W. H. Fuqua, Inc.*, 159 S.W.2d 228, 228-31 (Tex. Civ. App. 1942) (wherein broker denied recovery of commission where statute provided that no action could be commenced for a commission for the sale or purchse of real estate unless the agreement was in writing).

108. 700 IOWA ADMIN. CODE § 1.23(117) (1982).

109. 291 N.W.2d 331 (Iowa 1980).

110. Milholin v. Vorhies, 320 N.W.2d at 556, 557 (McGivern, J., dissenting) (citing Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331 (Iowa 1980)).

111. 291 N.W.2d at 332.

112. *Id.* at 337.

113. *Id.*

114. *Id.*

115. 320 N.W.2d at 557 (McGivern, J., dissenting).

there was no basis for awarding the broker's commission on quantum meruit. In *Milholin* it was a third party, Vorhies, who was using as a defense an administrative agency's regulation—a regulation which the Iowa Real Estate Commission should have acted upon. Because of the Commission's nonfeasance the court may have thought an award based on quantum meruit too much to be justified considering the violation.

Milholin has thus introduced the applicability of the Statute of Frauds onto brokerage agreements in Iowa. Ironically, brokers who have sought to regulate the real estate business may suffer the most from its enactment. Yet, what is created by regulation can be repealed. Should this new Statute of Frauds incur the Commission's disfavor, the impact of *Milholin* may soon become fleeting. Indeed, in Arizona an attempt has been made to alleviate the restrictions on brokerage agreements caused by the passage of a comparable Statute of Frauds.[116]

In the recent case of *Red Carpet - Barry and Associates v. Apex Associated, Inc.*,[117] the Arizona Real Estate Department amended its rule to require, in part, "that real estate listing agreements for property used for commercial or agricultural purposes need not be in writing."[118] In denying a subsequent claim for commission based on this amendment, the Arizona court relied upon a savings clause appended to the new rules which in part reserved the right to subsequently discipline a broker for conduct in violation of prior rules which had occurred during the time they were effective.[119]

Application of *Red Carpet - Barry* to oral listing agreements in Iowa may play a very prominent role should the Iowa Real Estate Commission decide to repeal its written listing requirement. Its role, however, would be limited to violative conduct which had occurred during the effective period of those prior rules. More ominous, in fact, would be the extension of *Red Carpet - Barry* to all oral listing agreements, regardless of the time the conduct was found to be violative of prior rules. That such a foreboding extension could occur can be found in a logical reading of *Milholin*.

In conclusion, the Iowa Real Estate Commission's regulation requiring all listing agreements to be in writing does not directly or explicitly void recovery of a broker's commission based on an oral listing agreement. Rather, application of that regulation as a Statute of Frauds as it pertains to brokerage agreements was sanctioned by judicial review, either as a result of public policy or merely as a matter of interpretation of the regulation. If as a matter of policy the Iowa Real Estate Commission should repeal its regulation, then all actions for commissions, whether based on oral listing agree-

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116. Red Carpet - Barry and Associates v. Apex Associated, Inc., 130 Ariz. 302, 635 P.2d 1224 (Ariz. Ct. App. 1981).

117. 130 Ariz. 302, 635 P.2d 1224 (Ariz. Ct. App. 1981).

118. *Id.* at ____, 635 P.2d at 1226.

119. *Id.*

ments or quantum meruit, may remain invalid . . . with *Milholin* as precedent.

Tom Pastrnak