

HIGHLIGHT OF FACTORS TO CONSIDER IN DETERMINING PROCURING CAUSE

Procuring Cause

Black's Law Dictionary, Fifth Edition, defines procuring cause as follows:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause".

A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms. *Mohamed v. Robbins*, 23 Ariz. App. 195, 531 p. 2d 928, 930.

While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by Boards and Associations of REALTORS[®], procuring cause can be readily understood as the uninterrupted series of casual events which results in the successful transaction to come about. Many REALTORS[®], Executive Officers, lawyers and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no "typical" real estate transaction any more than there is "typical" real estate or a "typical" REALTOR[®]. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association's Board of Director's, in 1973, adopted Official Interpretation 31 of Article I, Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

"A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR[®] in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership."

The explanation of Interpretation 31 goes on to provide, in part:

"... [T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy."

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants made blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in a non-agency capacity defined by law) is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participant engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease).
(Adopted 4/95)

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel member in determining procuring cause. (Adopted 4/95)

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I. Each case of “procuring cause” must be determined on its own unique set of facts:

- A. No preconceived or predetermined formula or rules shall be used (i.e., no “threshold”, “protection period” or other similar rule).
- B. The factual pattern of each case should be analyzed utilizing the Code of Ethics and factors suggested by the NATIONAL ASSOCIATION OF REALTORS®.
- C. Where relevant, the provisions of listing agreements and/or sales contracts should be considered...

II. Factors suggested by the NATIONAL ASSOCIATION OF REALTORS®

- Who was the listing agent?
- Was there a written listing agreement between the property owner and the listing agent? Were both of the parties to the dispute authorized to act as agent of the principal or subagent of the listing broker?
- If subagency by one or more of the parties is involved, how were the terms and conditions of subagency established?
- Who first introduced the customer to the property and how was such introduction made?
- Did the first or original introduction to the property actually originate an uninterrupted series of events leading to sale (or objective of the transaction) or was the series of events originated by the first introduction to the property hindered or terminated at any point for cause such as abandonment or estrangement of the customer by the agent or subagent?
- Was there a faithful exercise of agency or subagency on the part of the individual making the first introduction of the property to the customer or, conversely, was there fault or deficiency on the part of said agent or subagent either in the interest of the client or in fairness to the customer?
- How did the second agent or subagent enter the transaction?
- Was the second agent or subagent to enter the transaction aware of the prior introduction and/or negotiation on the property with the customer by the first agent or subagent?
- If the second agent or subagent was aware of the prior introduction of the property and/or negotiation on the property with the customer by the first agent or subagent, what did he do to serve the interest of the client and yet be fair to all parties, avoiding action inconsistent with the agency of the other agent or subagent?
- Was the entry of the second agent or subagent into the transaction an intrusion upon agency or was innocent exercise of agency or subagency in the interest of the client and pursuit of a customer?
- Did the original introduction to the property originate the uninterrupted series of events leading to the culmination of the successful transaction, or did the series of events falter and die?
- Did the subsequent, or second, introduction start a second or separate series of events which were not dependent upon the first introduction and/or negotiation on the property, with said second introduction and series of events flowing there from leading to the successful transaction?
- What was the nature of the transaction giving rise to the arbitration request?
- Was the property listed or subject to management agreement?
- Was it in effect at the time the dispute arose?
- Who was the cooperating broker or brokers?
- Are all appropriate parties to the matter joined?
- Is or was the matter the subject of litigation
- Were any of the parties acting as subagents? As buyer brokers? In some other capacity?
- Did any of the cooperating brokers have any agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?
- Were any of the brokers (including the listing broker) acting as a principal in the transaction?
- Were all disclosures mandated by law or the Code of Ethics complied with?
- Who first introduced the ultimate purchaser or tenant to the property?
- When was the first introduction made?
- Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale (or to any other intended objective of the transaction), or was the series of events hindered or interrupted in any way.

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- If there was an interruption or break in the original series of events, how was it caused, and by whom?
- Did the broker making the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal for the transaction?
- Did the broker making the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to choose to utilize the services of another broker?
- Was there interference in the series of events from an outside or intervening cause or party?
- What offers (if any) of cooperation and compensation were extended to cooperating brokers acting as subagents, buyer brokers, or to brokers acting in any other way capacity?
- If an offer of cooperation and compensation was made, how was it communicated?
- If the cooperating brokers were subagents, was there a faithful exercise of agency on their part, or was there any breach or failure to meet the duties owed to a principal?
- If the cooperating brokers were buyer agents or were acting in a nonagency capacity, were their actions in accordance with the terms and conditions of the listing broker's offer of cooperation and compensation (if any)?
- If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
- If more than one cooperating broker was involved, was the second cooperating broker aware of any prior introduction of the purchaser to the property by the listing broker or by another cooperating broker?
- Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?
- Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction?
- Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

III. Buyer must be "ready, willing and able" to purchase:

- A. All contract contingencies (e.g., financing, selling buyer's home, rezoning) must be satisfied before purchaser is considered a "ready, willing and able" buyer.
- B. Ready, willing and able purchaser must be secured during period of broker's agency.
- C. To prove he is the procuring cause where a sale fails, a broker must show not only that buyer is "ready, willing and able" to purchase, but also that the seller had an opportunity to complete the sale and that the sale failed because of seller's fault.

IV. Controversies between brokers and between broker and sales associates:

In determining which of two brokers, or whether a sales associate in a dispute with his broker, is the procuring cause of sale, the rules governing controversies between brokers and owners (outlined above) are equally applicable.