Procuring Cause

Hey! That’s MY Client!
Procuring Cause Pitfalls &
How to Avoid Them

What is Procuring Cause?

According to the National Association of
REALTORS® procuring cause is:

“the uninterrupted series of causal events
that leads to a successful transaction.”

What does this mean?
What does that mean?

Ultimately, Procuring Cause is a “FACT based” analysis of the specific events in a transaction to determine who should be paid a commission.

The are no definitive “rules.” Only “guidelines” to follow based on the facts.

Article 17 – NAR Code of Ethics

Many procuring cause disputes are arbitrable pursuant to the REALTOR Code of Ethics.

These include:

- Disputes between REALTORS®
- Disputes between agent members of REALTOR® owned MLS
- Disputes between REALTORS® and consenting Non-REALTORS
Time Frames/Statute of Limitations

NAR/Arbitration = 180 days from Closing of transaction or day complainant knew or reasonably should have know of dispute.

State Law/Statute of Limitations = varies

Procuring Cause “Guidelines”

NAR provides guidelines for arbitrators hearing procuring cause complaints to consider as they perform their analysis of the FACTS involved in a dispute between eligible parties.

What are some of the facts that may be considered?
Guidelines

- When and How were the parties first introduced and Who introduced them?
- Was there an offer of compensation made through MLS or other writing?
- Were there any other written agreements between the parties (agency, exclusive)?
- Was there an “uninterrupted series of events” that lead to the sale? If not, how/why was it interrupted and for how long?
- Was there conduct by the broker that could reasonably be construed as abandonment or neglect of the party?

Guidelines (continued)

- Was the entry of a new broker into the transaction a violation of any written agreements between the Parties?
- Was the parties decision to enter into a transaction the result of broker’s effort or information?
- Is there evidence of bad faith on behalf of any of the parties (brokers, buyer, seller, etc.)?
- Did the new broker initiate a separate, independent series of events that ultimately lead to a successful transaction?

    LONG LIST! But only a handful of the types of questions an arbitrator might have as they analyze procuring cause.
Fact Pattern #1

Listing Broker placed a listing in the MLS and offered compensation to buyer agents. Buyer Broker #1 showed the property to Buyer on Sunday and again on Tuesday. On Wednesday, Buyer Broker #2 wrote an offer to purchase on behalf of Buyer which was presented to the Seller by Listing Broker and which was accepted by Seller. At closing, a commission is paid to Buyer Broker #2.

Fact Pattern #1 Claims

Under NAR rules, Buyer Broker #1 could bring a claim against Buyer Broker #2 (NAR Standards of Practice 17-4) OR against Listing Broker, who had promised to compensate the procuring cause of sale via the MLS listing.

Assuming that all brokers are REALTORS, the claim would be arbitrable.
Fact Pattern #1 Claims (continued)

Under state law, Buyer Broker #1 MAY be able to bring a claim against Buyer IF the Buyer and Buyer Broker #1 were parties to a written agreement (Exclusive Right to Buy) OR, if no written agreement, is there evidence of some other form of agreement.

Fact Pattern #1 Analysis (NAR)

In an arbitration hearing brought under NAR, the Hearing Panel will consider, among other things, why Buyer made the offer to purchase through Broker #2 instead of Broker #1. If it is determined that Broker #2 initiated a series of events which were unbroken in their continuity and which resulted in the sale, Broker #2 will likely prevail.
Fact Pattern #1 Analysis  
(Contract Law)

- What was relationship between Broker #1 and Broker #2?
- Why did Buyer switch brokers?
- Did Buyer’s needs change between Tuesday & Wednesday?
- Did Buyer Broker #1 do anything other than show the property?
- Did Buyer have prior knowledge of the property?

Fact Pattern #2

Listing Broker placed a listing in the MLS and made an offer of compensation to buyer agents. Buyer Broker #1 showed the property to Buyer, who appeared uninterested. Buyer Broker #1 made no effort to further contact Buyer. Six weeks later, Buyer Broker #2 wrote an offer on the property on behalf of Buyer, presented it to Listing Broker, and it was accepted.
Fact Pattern #2 Claims

Similar to the first fact pattern, Buyer Broker #1 could likely file an arbitrable claim under NAR Code of Ethics against either Listing Broker OR Buyer Broker #2.

Ideally, Listing Broker and Buyer Broker #2 should be joined in the claim so that any competing claims can be resolved in same hearing.

Fact Pattern #2 Analysis

(NAR)

In Fact Pattern #2, the Hearing Panel will likely be considering the length of time without contact from Buyer Broker #1 that transpired. Six weeks is a long period that, absent additional facts, would likely constitute abandonment of the Buyer by Buyer Broker #1. Also, it may be easier for panel to determine that Buyer Broker #2 initiated a second, separate series of events that lead to the sale.
Fact Pattern #2 Analysis
(Contract Law)

• Did the Buyer execute an agreement with Buyer Broker #1?
• Did the Buyer terminate the relationship with Buyer Broker #1?
• Did the Buyer’s needs change during the six week period?
• Did Buyer Broker #1 make any attempts to contact Buyer during six-week period?

Fact Pattern #3

Listing Broker placed a listing in the MLS and offered compensation to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Listing Broker with a signed purchase agreement, which was accepted by the seller.
Fact Pattern #3 Claims

(NAR)

Broker Z was the procuring cause of sale, BUT Listing Broker’s offer of compensation was made only to members of the MLS. Listing Broker never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Pattern #3 Analysis

(Contract Law)

- Did Broker Z have an agency agreement with the Buyer?
- If so, what did the agency agreement state about compensation?
- Under the circumstances, what would Listing Broker have paid a participant in the MLS?
Fact Pattern #4

Buyer Broker has had a long-standing relationship with Buyer, the real estate manager of a large, diversified company. Buyer Broker has acquired or disposed of 12 properties for Client over a 5 year period. Buyer asks Buyer Broker to locate a large warehouse property to consolidate inventories from three local plants. Buyer Broker conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Buyer, and identifies 4 possible properties that seem to meet most of Buyer’s needs. At Buyer’s request, he arranges and conducts inspections of each of these properties with several operations level individuals. Two of the properties were listed for sale exclusively by Listing Broker. After the inspections, Buyer Broker sends Listing Broker a written registration letter in which he identifies Buyer’s company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Listing Broker responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Buyer Broker on either of the 2 properties. Six weeks after the inspections, Buyer selects one of the properties and instructs Buyer Broker to initiate negotiations with Listing Broker. After several weeks the negotiations reach an impasse. Two weeks later, Buyer Broker learns that Listing Broker has presented a proposal directly to Buyer for the other property that was previously inspected.

Fact Pattern #4  Continued...

Buyer Broker contacts Listing Broker, and demands to be included in the negotiations. Listing Broker refuses, telling Buyer Broker that he has “lost control of his prospect,” and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property.
Fact Pattern #4 Claims

(Contract Law)

Courts will typically award a commission to a broker that is frozen out of a sale by another broker to avoid paying a commission.
Fact Pattern #4 Analysis  
(NAR)

The Hearing Panel will consider Buyer Broker’s introduction of the property to Buyer, the property reports prepared by Buyer Broker, the time between the impasse in negotiations on the first property and the sale of the second property, and the Buyer’s reasons for excluding Buyer Broker from the sale of the second property.

If the Hearing Panel determines that Buyer Broker initiated the series of events that led to the successful sale, Buyer Broker will likely prevail.

Fact Pattern #4 Analysis  
(Contract Law)

- Was there any difference between the commissions for the first and second properties?
- Did the price for the second property change?
- Did Buyer’s needs change during the two-week period?
- Did the Buyer and Buyer’s Broker have an agreement for compensation?
- Did an agreement between Buyer and Buyer’s broker terminate during the two-week period?
Five Tips to Avoid Litigation

1. Don’t let your license expire, and make sure that you have a written agency agreement
2. Introducing a buyer to a property is almost never enough
3. If you have to talk about indemnification, a suit is likely
4. Even with a significant passage of time, a commission may be owed
5. Act in good faith, your conduct may be judged

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