

## PROCURING CAUSE FACTORS

Whether a broker is the procuring cause of a sale must be factually determined on a case-by-case basis. Many factors can impact a determination of procuring cause, but no one factor is by itself determinative. Procuring cause is in fact the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable. In other words, the sale would not have occurred but for the broker's efforts.

When reviewing the factors listed below, it is important to note that the occurrence of any particular factor in a fact situation does not necessarily mean that procuring cause does or does not exist. This is because it is the interplay of factors that is so important in recognizing procuring cause, not the presence of any one factor alone. A specific factor can, in fact, cut either way, depending on its importance compared to the other factors in the case and depending on when it occurs in the timeline of the case.

Procuring cause factors may be grouped, for organizational purposes, into nine different categories. These categories are:

- The nature and status of the transaction
- The nature, status and terms of the listing agreement or offer to compensate
- The roles and relationships of the parties
- The initial contact with the purchaser
- The conduct of the broker\* or agent
- Continuity and breaks in continuity
- The conduct of the buyer
- The conduct of the seller
- Other information

In the analysis that follows, specific procuring cause factors are grouped by the above categories.

### **PROPOSED Procuring Cause Factors:**

#### **I. The Nature and Status of the Transaction**

- A. What was the nature of the transaction?**
- B. Is or was the matter the subject of litigation?**

#### **II. The Nature, Status and Terms of the Listing Agreement or Offer to Compensate**

- A. What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open or some other form of agreement?**

- B. Was the agreement in writing?**
- C. Was the agreement in effect at the time the sales contract was executed?**
- D. Was the property listed subject to a management agreement?**
- E. Is the claimant a party to whom the listing broker's offer of compensation was extended?**
- F. If an offer of cooperation and compensation was made, how was it communicated?**
- G. Were the broker's actions in accordance with the terms and conditions of the agreement or offer of cooperation and compensation (if any)?**
  - 1. Were all conditions of the agreement met?**
  - 2. Did the final terms of the sale meet those specified in the agreement?**

### **III. Roles and Relationships of the Parties**

- A. Who was the listing agent?**
- B. Who was the cooperating broker or brokers?**
- C. Are all appropriate parties to the matter joined?**
- D. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?**
- E. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?**
- F. Were any of the brokers (including the listing broker) acting as a principal in the transaction?**
- G. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?**

1. Was the party to whom the property was ultimately sold represented by a party with whom the broker had previously dealt?
2. Is the primary shareholder of the ultimate buyer-corporation a party with whom the broker had previously dealt?
3. Was a prior prospect a vital link to the ultimate buyer?

**IV. Initial Contact with the Purchaser**

- A. Who first introduced the ultimate purchaser or tenant to the property?
- B. When was the first introduction made?
  1. Did the ultimate buyer find the property on his own?
  2. Was the introduction made when the buyer had an immediate need for that specific property?
  3. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
  4. Were there previous dealings between the buyer and the seller?
- C. How was the first introduction made?
  1. Was the introduction made to a different representative of the buyer?
  2. Was the "introduction" merely a mention that the property was listed?
  3. What property was first introduced?

**V. CONDUCT OF THE BROKER**

- A. Were all disclosures mandated by law or the Code of Ethics complied with?
- B. Was there faithful exercise of agency on the broker's part, or was there any breach or failure to meet the duties owed to a principal?
- C. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
- D. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker?

- E. 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 -- that is, did the broker perform services which assisted the buyer in making his decision to purchase?**
  - 1. Did the broker make preparations to show the property to buyer?**
  - 2. Did the broker make continued efforts after showing the property?**
  - 3. Did the broker remove an impediment to the sale?**
  - 4. Did the broker make a proposal upon which the final transaction was based?**
  - 5. Did the broker motivate the buyer to purchase?**
- F. How do the efforts of one broker compare to the efforts of another?**
  - 1. What was the relative amount of effort by one broker compared to another?**
  - 2. What was the relative success or failure of negotiations conducted by one broker compared to the other?**

**VI. CONTINUITY AND BREAKS IN CONTINUITY**

- A. What was the length of time between the broker's efforts and the final sales agreement?**
- B. 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?**
  - 1. Did the buyer terminate the relationship with the broker? Was such termination in good faith?**
  - 2. Did negotiations break down?**
- C. If there was an interruption or break in the original series of events, how was it caused, and by whom?**
  - 1. Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?**

2. Was there the development of a new, different or independent motive behind the purchase?
  3. Was there interference in the series of events from any outside or intervening cause or party?
- D. 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 from the transaction?
- E. 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?

**VII. Conduct of Buyer**

- A. Did the buyer make the decision to buy independent of the broker's efforts/information?
- B. Did the buyer negotiate without any aid from the broker?
- C. Did the buyer seek to freeze out the broker?
1. Did the buyer seek another broker in order to get a lower price?
  2. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
  3. Did the contract provide that no brokers or certain brokers had been involved?
- D. Did the buyer divulge to the seller that a certain broker had brought him to the transaction?

**VIII. CONDUCT OF THE SELLER**

- A. Did the Seller act in bad faith to deprive the broker of his commission?
1. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equalled the broker's commission?

2. Was there bad faith evident from the fact that a sale to a third party was a straw transaction which was designed to avoid paying commission?
  3. Was there bad faith evident from the fact that the seller told the broker he wouldn't sell under certain conditions, but did so via another broker?
  4. Did the owner freeze out the broker to avoid a commission dispute?
  5. Did the seller freeze out the broker to avoid paying a commission at all?
- B. Did the seller not authorize the broker to accept an amount the seller ultimately accepted?
- IX. **OTHER INFORMATION:** 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?

**NON-CONCLUSIONS:**

It is important to remember that no automatic conclusions should be drawn from the presence or absence of any one factor. Procuring cause is not always achieved by introducing the parties. It is not always achieved by finalizing the transaction. No preconceived formula or rule should be used to determine procuring cause. Rather each factor should be weighed in conjunction with the other factors relevant to the case. In short, arbitration panels must remember that the above factors are simply considerations, not conclusions.