

# THE DOCTRINE OF PROCURING CAUSE

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# MOORE



# C O M P A N Y

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## A. PROCURING CAUSE DEFINED

a. Under Florida law, a broker deserves a commission if:

i. The broker initiates negotiations by doing some affirmative act to bring buyer and seller together. *Rotemi Realty, Inc v. Act Realty Co., Inc.*, 911 So. 2d 1181 (Fla. 2005)

1) “If the broker locates a purchaser, inaugurates negotiations with him, and so informs the seller, he is the procuring cause and is entitled to his commission even though the seller interrupts the negotiations and sells to the purchaser at a price lower than the one which the broker was authorized to accept.” *Dawson v. Hadden*, 743 So. 2d 1230, 1232 (Fla. 5th DCA 1999).

a) Introduce the buyer to the Vessel and inform the Seller of the negotiations.

2) “A broker may recover a commission ‘even after expiration of the listing agreement which contained an exclusive right to sell provision.’” *Venturvest Realty Corp. v. A.K.S.I.P. Corp.*, 793 So. 2d 1054, 1056 (Fla. 3d DCA 2001) (quoting *Monrose, Inc. v. Baldrige*, 423 So. 2d 467, 468 (Fla. 4th DCA 1982)).

a) Canceling a Listing Agreement does not necessarily defeat the right to a commission if the Broker introduced the buyer to the Vessel.

ii. The broker is involved in the continuing negotiations between the seller and the buyer, unless the seller and buyer intentionally exclude the broker from the negotiations. *Rotemi Realty, Inc v. Act Realty Co., Inc.*, 911 So. 2d 1181 (Fla. 2005).

A. PROCURING CAUSE DEFINED (continued)

1) “If the broker abandons his attempts to bring the parties together and they later reach a deal on their own, the broker is not entitled to a commission. However, if the seller and buyer intentionally exclude the broker from the negotiations and then strike a deal, the broker is still entitled to a commission.” *Osheroff v. Rauch Weaver Millsaps & Co.*, 882 So. 2d 503, 505 (Fla. 4th DCA 2004).

2) A Broker who did not contact the owner for 30 to 60 days was found to have “discontinued negotiations” and “abandoned the sale”. *Darracott v. Hemphill*, 82 So. 2d 719 (1955).

3) “If the broker has brought the parties together and a sale is effected as a result of continuous negotiations inaugurated by him, he will not be defeated in his effort to recover compensation simply because of a variation between the original terms stated by the owner and those finally accepted.” *Taylor v. Dorsey*, 155 Fla. 305, 19 So. 2d 876, 878 (Fla. 1944).

a) A change in terms, even a variation in the purchase price does not vitiate a Broker’s right to a commission.

4) “Intentional exclusion does not require a showing of bad faith. Rather, intentional exclusion means that the buyer has negotiated directly with the seller without the participation of the broker who first brought the parties together. This negotiation is called ‘secret’ because only the buyer and seller are in on it.” *Media Servs. Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326, 1330 (11th Cir. 2001).

A. PROCURING CAUSE DEFINED (continued)

5. “The seller and buyer need not have acted in a ‘secret,’ ‘clandestine,’ and conspiratorial’ manner. ‘These terms, in this context, mean nothing more than that the buyer has negotiated directly with the seller without the participation of the broker who first called the property to the buyer’s attention.” *Sheldon Greene & Assoc., Inc. v. Rosinda Investments, N.V.*, 475 So. 2d 925, 928 (Fla. 3d DCA 1985).
6. “We read Florida law to state that a broker who brings the buyer and seller together may be entitled to a commission in the absence of an express contract, even if the sale was not the result of continuous negotiation conducted by the broker, if the seller and buyer intentionally exclude the broker from the negotiations.” *Media Servs. Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326, 1329 (11th Cir. 2001).
7. If a Broker brings a willing buyer to a Seller the Seller may reject the offer. However, if the offer is accepted, the right to a commission vests at that time even if the owner reconsiders the terms upon which the sale will be effected. The right to a commission “vests” on acceptance of the offer by the Seller. *Taylor v. Dorsey*, 19 So. 2d 876 (1944)

## B. EXCEPTION TO PROCURING CAUSE

- a. Where there is an “exclusive right to sell agreement” like a Central Listing Agreement, the procuring cause doctrine is inapplicable and normal rules of contract interpretation apply. *Flynn v. McGinty*, 61 So. 2d 318 (1952).
- b. An exclusive right to sell contract is binding and its terms regarding commission will generally be followed. If commission is not paid under a Listing Agreement the claim is for breach of contract.

## C. TORTIOUS INTERFERENCE

### a. Elements of the claim:

- i. Plaintiff had a business relationship, not necessarily evidenced by an enforceable contract
- ii. Defendant had knowledge of the relationship
- iii. Defendant intentionally and unjustifiably interfered with the relationship
  1. “In determining whether an actor’s conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors” (Restat 2d of Torts §767):

#### a. The nature of the actor’s conduct

- i. Defendant acted maliciously.

#### b. The actor’s motive

C. TORTIOUS INTERFERENCE (continued)

- i. Obtain the yacht at a lower price by avoiding commissions
  - c. The interests of the other with which the actor’s conduct interferes
    - i. Right to a commission interfered with
  - d. The interests sought to be advanced by the actor
    - i. Monetary interests
      - 1. Avoid paying a brokerage fee
      - 2. Obtain the yacht at a lower price.
  - e. The social interests in protecting the freedom of action of the actor and the contractual interests of the other
    - i. Need to protect brokers from being cut out of deals after bringing interested parties together
    - ii. Fairness dictates that Brokers receive a commission for their work facilitating the purchase and sale of a yacht
  - f. The proximity or remoteness of the actor’s conduct to the interference

C. TORTIOUS INTERFERENCE (continued)

i. Going around the Broker is the interfering conduct

g. The relations between the parties

i. The Broker was acting for the Buyer

ii. The Broker was the Buyer’s exclusive Broker

2. “. . . whether. . . admittedly intentional interference [is] unjustifiable, depends upon a balancing of the importance of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important.” *Heavener, Ogier Servs., Inc. v. R.W. Florida Region, Inc.*, 418 S.2d 1074; 1982 Fla. App. LEXIS 2077

iv. Plaintiff suffered damages

1. As a result of the tortious interference, Broker suffered damages in the form of loss of commission.

2. Where there is no Agreement to the amount of commission argue industry standard of 10% of gross sales price.

D. UNJUST ENRICHMENT



i. “Florida law recognizes that a broker may recover compensation under a theory of unjust enrichment.” *Media Servs. Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326, 1329 (11th Cir. 2001).

D. UNJUST ENRICHMENT (continued)

ii. “Plaintiff must show either the existence of an implied contract to pay him for services in finding and negotiating with the ultimate purchasers, **or that he was the procuring factor in the sale.**” *Media Servs. Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326, 1329 (11th Cir. 2001).

iii. Elements (*Id.* at 1330):

1. The Plaintiff has conferred a benefit on the Defendant

a. The Broker confers a Benefit to both the Seller and Buyer by facilitating the sale.

b. Seller: received purchase funds

c. Buyer: Received a yacht

2. The Defendant has knowledge of the benefit

3. The Defendant has accepted or retained the benefit conferred

4. The circumstances are such that it would be inequitable for the Defendant to retain the benefit without paying fair value

a. As the procuring cause of Buyer’s purchase of a Vessel from which Buyer and Seller benefitted, it would be inequitable for these parties to retain the benefit without paying fair value, i.e. a commission.

## E. BREACH OF IMPLIED CONTRACT:

- a. A valid contract arises when the parties’ assent is manifested through written or spoken words, **or** “inferred in whole or in part from the parties’ conduct.” *Commerce P’ship v. Equity Contracting Co.*, 695 So. 2d 383, 385 (Fla. 4th DCA 1997). A contract based on the parties’ words is characterized as express, whereas, a contract based on the parties’ conduct is said to be implied in fact. *Id.*
- b. Breach of Implied Contract differs from unjust enrichment because unjust enrichment is not based on the parties’ assent.
- c. Elements of a Breach of Implied Contract (*Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008)):
  - i. Contract
  - ii. Breach
  - iii. Damages
- d. In the broker context this might arise as follows:
  - i. Seller makes an implied promise to pay a commission to any broker who procures a purchaser for their Yacht.
  - ii. Seller encourages brokers, to procure a purchaser for their vessel in return for a commission, as is standard in the industry
  - iii. The Broker then accepts this tacit offer and delivers a willing buyer
  - iv. The seller refuses to pay a commission

## F. QUANTUM MERUIT

- a. The law imputes the existence of a contract based upon one party’s having performed services under circumstances in which the parties must have understood and intended compensation to be paid. *Tipper v. Great Lakes Chem. Co.*, 281 So. 2d 10 (Fla. 1973).
- b. Elements (*Hermanowski v. Naranja Lakes Condominium No. Five, Inc.*, 421 So. 2d 558 (Fla. 3d DCA 1982), *rev. denied*, 430 So. 2d 451 (Fla. 1983)):
  - i. Recipient acquiesced in the provision of services
  - ii. Recipient was aware that the provider expected to be compensated
  - iii. Was unjustly enriched thereby.
- c. Essentially, since specific terms of a contract are absent, the law supplies the missing contract price by asking what one would have to pay in the open market for the same work. Thus the measure of damages under quantum meruit is defined as “the reasonable value of the labor performed and the market value of the materials furnished” to the project. *Moore v. Spanish River Land Co.*, 159 So. 673, 674 (Fla. 1935).
- d. This claim may arise in the yacht broker context when a broker provides brokerage services, which are accepted understanding that a commission would be owed.
- e. Under ordinary circumstances, a reasonable person would reasonably expect to pay for such a benefit.



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