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EXTENSION CLAUSES IN LOUISIANA LISTING AGREEMENTS

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In a typical real estate brokerage contract, generally referred to as a "listing agreement," the broker undertakes the obligation of finding a buyer ready, willing, and able to purchase the described property for the price specified or on any other terms acceptable to the seller. If the broker accomplishes this within the listing period, he is entitled to a commission, normally expressed as a percentage of the price obtained. Unfortunately for brokers, sellers have proven to be extremely resourceful in devising schemes to avoid paying the agreed commissions. One common ploy has been the owner's refusal to accept the buyer's offer during the listing period, only to accept a similar offer from the same buyer shortly after the period has expired. Louisiana courts have been quick to find that under such circumstances the commission has nonetheless been earned, since the broker was in fact the "procuring cause" of the sale.[1]

In order to afford the broker even greater protection, most listing agreements include an extension clause (sometimes referred to as a "protection clause"). The extension clause generally provides that if, within some designated period *after* the expiration of the listing agreement, the property is sold to a person with whom the broker has carried on some designated activity *during* the listing, the commission is to be paid. Thus, two time periods are discernible: the listing period and a subsequent extension period. The extension clause itself delineates what must transpire between the broker and the eventual purchaser for the commission to be collectable. But, in any event, the presence of the extension clause should prevent the broker from having to meet the rigid standard of having been a "procuring cause" of the sale.

In preparing this article the authors obtained copies of listing agreements prepared by Boards of Realtors in various parts of the state. Of the eleven listing agreements examined, ten had extension clauses. The extension clauses presently in use vary widely in their terminology, but can be grouped as follows:[2]

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1. See text at note 6, *infra*.
2. Emphasis is supplied.

a. "provided purchaser has *become interested* in said property as a result of the efforts or advertising of said REALTOR . . ." (4 forms used this language)
b. "with anyone to whom said property has been *quoted*. . ." (2 forms)
c. "with anyone to whom said property has been *submitted* . . ." (1 form)
d. "to whom said property was *shown or submitted* by anyone (or with whom *negotiations* involving said property had been carried on) . . ." (1 form)
e. "to whom the property was *shown* by an Agent (prior to the termination date) and the *negotiations* resulting in the sale and/or exchange were carried on prior to the termination of this agreement" (1 form)
f. "to anyone with whom the REALTOR has had *negotiation* prior to final termination . . ." (1 form).

Given the diverse language of the clauses, one would assume that they are intended to have a variety of meanings. For example, whatever meaning is attached to the expression "become interested," it need not be the same as that of "quoted," "submitted," or "negotiated." Thus, the broker's right to his commission should be based on whether the contractual provision of the extension clause in question has been satisfied. If, for instance, the clause requires that the property be "quoted," then the central inquiry should be whether that did indeed transpire during the listing. Unfortunately, Louisiana courts have not always measured the broker's actions against the requisites of his contract. In some cases, for example, a court has compared the broker's conduct to conduct in a previous case even though the respective extension clauses were entirely different.[3] It is clearly illogical to attach identical meanings to contractual provisions that are unquestionably not identical.

The purpose of an extension clause is often misunderstood. In some cases the broker was held to be entitled to his commission only if he could show that he was the "procuring cause" of the sale.[4] As has been noted, this analysis is correct only if no extension clause exists. The very reason for the extension clause is to afford the broker additional protections not allowed by the procuring cause

3. Caruso—Goll v. La Nasa, 72 So. 2d 13 (La. App. Orl. Cir. 1954); Alan F. Dreyfus Co., Inc. v. Friedman, 129 So. 679 (La.1930).

4. Harvey v. Sims, 198 So. 389 (La. App. Orl. Cir. 1940); Carter v. Hayes, 337 So. 2d 295 (La. App. 2d Cir. 1976).

doctrine. A court which reverts to the procuring cause doctrine is failing to recognize the quite different contractual obligations freely agreed to by both parties in the listing agreement. Fortunately, recent appellate court decisions seem to be rejecting this line of reasoning.[5]

The purpose of this article is to review and analyze the precedents established by Louisiana courts in real estate listing contracts. The following topics will be discussed: (a) obligations if the listing agreement does not contain an extension clause (the procuring cause doctrine), (b) obligations if the agreement contains any of the various types of extension clauses, (c) obligations if the sale is completed after the expiration of the extension clause, and (d) miscellaneous problems. For the sake of simplicity, the identity of the purchaser will not be given; he will be referred to merely as X.

OBLIGATIONS IF THE LISTING AGREEMENT DOES NOT CONTAIN AN EXTENSION CLAUSE: THE PROCURING CAUSE DOCTRINE

In the absence of an extension clause the broker is forced to rely upon the assertion that justice and fair play call for the payment of the commission. Essentially, the broker's claim is based on a theory of quantum meruit; the owner should not be allowed to avail himself of the efforts of the broker without paying a fair compensation. In 1902 the Louisiana Supreme Court established the following rule: "The broker, in order to be entitled to his commission, must have been the *procuring cause* of the transaction. He cannot recover unless he proves his authority to act, and that he was the procuring agency in effecting the sale."[6]

Louisiana courts have generally accepted the following definition of procuring cause:

> As used in that branch of the law relating to brokers' commissions, the terms "procuring cause," "efficient cause," and "proximate cause" have substantially, if not quite, the same meaning and are often used interchangeably; they refer to a cause originating or setting in motion a series of events which without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an

5. Harkey v. Gahagan, 338 So. 2d 133 (La. App. 2d Cir. 1976).
6. Taylor v. Martin, 109 La. 137, 143, 33 So. 112, 115 (1902) (emphasis added).

ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.[7]

Five reported cases were found in which the broker was allowed his commission under this doctrine even though the sale was not completed until after the listing period has expired.[8] The overriding characteristic of these cases is the unbroken sequence of events connecting the efforts of the broker with the buyer's purchase of the property.

In *Saturn Realty, Inc. v. Muller*,[9] the work of the broker had resulted in the execution of a purchase agreement between the owner and the buyer during the listing period. The buyer, however, was unable to obtain the required loan during the period provided for in the contract, and the sale fell through. Thereafter the owner and the buyer engaged in further negotiations of which the broker was not informed, and one week after the expiration of the listing agreement a second purchase agreement was signed. The owner argued that no commission was owed since the listing agreement had expired, but the court disagreed, reasoning as follows:

> Generally, in the absence of an existing exclusive agency contract, where an agent has failed to effect a sale and negotiations have ceased or broken off, the owner may himself complete the sale and the fact that the sale may have been aided in some degree by previous efforts of the agent does not of itself entitle the latter to a commission; but based on the equitable maxim that the principal shall not be permitted to enrich himself at the expense of the agent whose services have inured to his benefit, the agent is entitled to a commission when it clearly appears that his efforts were the procuring cause of the sale. . . . We also find that negotiations for the sale and purchase between [X] and [the owner] continued without interruption following the homestead association's refusal to lend the full amount of $15,800 until those negotiations culminated in the agreement of April 30, 1965, approximately one week after the termination of the first agreement by reason of the non-fulfillment of the suspensive condition, and the sale of May 5, 1965. . . .[10]

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7. *See also*, Sleet v. Hardin, 383 So. 2d 122 (La. App. 3d Cir. 1980); Carter v. Hayes, 337 So. 2d 295 (La. App. 2d Cir. 1976); Cramer v. Guercio, 331 So. 2d 550 (La. App. 1st Cir. 1976), Sleet v. Williams, 291 So. 2d 495 (La. App. 3d Cir. 1974).

8. See notes 9, 11, 12, 16, & 18, *infra*.

9. 196 So. 2d 321 (La. App. 4th Cir. 1967).

10. *Id.* at 323. The court went on to say:

Nor does the fact that . . . [the owner] may have reduced the purchase price by

A similar result may be found in *Rolston v. Buff*.[11] Just after notifying the broker of his desire to terminate the listing, the owner sold the property to someone who had earlier been shown the house by the broker. The purchase was made on the same terms as those proferred by the broker, and no additional showing of the premises was required. The court concluded that the efforts of the broker were the procuring cause of the sale, though it may have been influenced by its obvious suspicion that the only reason for the owner's cancellation of the listing was his desire to avoid paying the brokerage commission.

This element of possible fraud was clearly a factor in the case of *Sollie v. People's Bank & Trust Co.*[12] In *Sollie* a broker, who had a listing agreement for an unspecified period, had *no contact* whatsoever with the ultimate purchasers. The purchasers learned of the availability of the property by means of an advertisement placed by the broker in the local newspaper. The purchasers inspected the property on their own and subsequenly examined the conveyance records to determine the identity of the owner. They then contacted the owner, who allegedly wrote his broker saying that "we (the owners) may be able to sell it ourselves" and that "'it is our understanding that from this date on if you sell the property you will receive a commission on same, but if we sell it ourselves or through some other source you will not be entitled to any commission." Approximately thirty-seven days later the owner sold the property directly to the purchaser. The broker denied receiving the above letter, but the court stated that the question of receipt was unimportant since in its opinion the broker was the procuring cause of the sale:

> There is no doubt that plaintiff did all, or practically all that a broker would be expected to do to find a purchaser. . . . Through plaintiff's efforts a purchaser was found who paid the price the owner was willing to accept. . . . The owner and purchaser were brought together through plaintiff's efforts. He was the procuring cause of the sale.[13]

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assuming payment of closing costs have the effect of depriving plaintiff of a commission. That a vendor of real estate reduces the price thereof in order to effect a sale of realty to one previously procured by a real estate agent as his prospective purchaser does not release the vendor from his liability to pay the agent's commission.

Id. at 324.

11. 130 So. 2d 732 (La. App. 1st Cir. 1961). Significantly, in *Rolston* the agency was for an unspecified term.

12. 194 So. 116 (La. App. 2d Cir. 1940).

13. *Id.* at 117.

This rather liberal construction of the procuring cause doctrine does not entirely square with the court's statement in the *Saturn Realty* case.[14] The fact that suspicions of fraud influenced the court's decision is apparent when the following language of the *Sollie* decision is considered:

> For reasons best known to him [the purchaser] he sought to circumvent plaintiff agency and deal directly with the owner. . . . As a witness, defendant's president, when asked if he did not withdraw the exclusive listing from plaintiff immediately after he had a "nibble" from a prospective purchaser, . . . replied "It probably looked that way."[15]

It would perhaps have been better for the court to have based its decision on the fraud, which it appeared to believe to be present, than to have held that this minimal effort of the broker sufficed to establish him as the procuring cause. The broker at best merely "interested" the purchaser in the property. Many extension clauses provide for just such a situation. In essence, the court gave the broker the benefit of an extension clause even though this agreement contained no such clause.

A fourth case in which the broker was awarded his commission is *Wolf v. Casamento*.[16] In this case the broker had caused X to become interested in the property in question. Unable to agree on a price, X and the owner arranged a lease of the property. When broker learned of the lease he contacted the owner, who encouraged him to continue to pursue X as a potential purchaser. The broker continued to solicit X until the listing period expired. One month later, X and the owner agreed to the terms of the sale.

Although X and the owner testified that they were not negotiating for a sale prior to the expiration of the listing agreement, the court found to the contrary. In ruling that the commission was earned the court observed:

> It is well settled that a real estate agent does not ordinarily earn his commission unless he procures a purchaser within the time fixed in his contract. . . . But it has also been established that the owner is liable to the agent for a commission in cases where the latter has procured a prospect and the owner has con-

14. 196 So. 2d at 323. See text at note 9, *supra*. The court in *Saturn Realty* stated that in order for the broker to be a procuring cause he must have done more than "[aid] in some degree."

15. 194 So. at 117.

16. 185 So. 537 (La. App. Orl. Cir. 1939).

> tinued negotiations uninterruptedly with such prospect which culminate in a sale of the property, even though the transfer is not made until after the termination of the agency contract. . . . In the case at bar, we have no hesitancy in holding that [X] was the plaintiff's prospect and that the defendant carried on secret dealings with him, which resulted in the sale of the house on November 6, 1936, for the purpose of defeating plaintiff's rights under the agency contract. It therefore follows that [the broker] is entitled to the recovery of the commission sued for.[17]

Essential to the court's ruling was the finding that the negotiations between the parties continued uninterruptedly from the expiration of the listing to the time of the eventual purchase. That is, if the parties had abandoned negotiations, but the tenant had made an acceptable offer after the expiration of the lease, the broker would not have been entitled to the commission because there would have been a break in the continuity of events. If, however, the broker had arranged for the prospective purchaser to obtain an *option* to purchase, the commission would have been earned if and when the option had been exercised. This was the holding in *Munson v. Alello*,[18] the fifth case in which the broker was successful in collecting his commission.

The owner was able to avoid paying the broker's commission in the case of *Cobb v. Saucier*.[19] Following the expiration of the written listing agreement (on October 5, 1945) the owner verbally authorized the broker to continue his efforts.[20] On February 9, 1946, the broker contacted X with the intention of interesting him in the property in question. On February 14 the broker showed the property to X, who offered to purchase it. The owner refused to sell for the price offered. X then advised the broker that he was no longer interested in the property. There was no further contact between X and the broker. About three weeks later the owner and the broker conversed over the phone; the owner testified that at the time he told the broker to "drop it—the matter was closed." Two or three days after this conversation, X contacted the owner, but the parties could not come to an agreement. The owner placed an ad for the property in the local paper three weeks later; who should respond but Mr. X! The two finally agreed to terms on April 20th. The court held that

17. *Id.* at 539.

18. 199 So. 2d 577 (La. App. 1st Cir. 1967).

19. 30 So. 2d 784 (La. App. 2d Cir. 1947).

20. The owner testified that there was no such verbal authorization. 30 So. 2d at 785.

> [i]t is not open to question that plaintiff had utterly failed in his effort to bring defendant and [X] together on comomon ground . . . . At that time (termination of the listing) defendant had no good reason to think or believe that [X] nurtured ambition to own the [property]; and plaintiff evidently had dismissed him from consideration as a likely prospect because he had for some time prior ceased to try to sell him the property or quicken his interest therein, but had endeavored to sell it to others. Therefore, it cannot be said that plaintiff's efforts were the procuring cause, except possibly to a very remote exent, of the sale that was finally made to [X].[21]

Taken as a whole, these decisions are faithful to the dictates of the Louisiana Supreme Court.[22] The broker must have set in motion a sequence of events which, without break in continuity, culminates in the sale of the property to a purchaser originally procured by his efforts. Moreover, these efforts of the broker must have been so substantial that it can fairly be said that the purchase was attributable to him. If, however, there are indications that the owner has made a concerted effort to fraudulently reap the benefits of the broker's services without paying the commission, a lesser effort on the part of the broker may suffice. In any event, negotiations between the owner and the purchaser must be continuous.

OBLIGATIONS IF THE AGREEMENT CONTAINS ANY OF THE VARIOUS KINDS OF EXTENSION CLAUSES

Phrase Requiring Broker to Have "Submitted" Property to the Purchaser

There is only one Louisiana decision in which the "submitted" phrase of an extension clause was at issue. In *Harvey v. Sims*,[23] the extension clause provided: "If this property is sold within 180 days after the termination of this contract to any person to whom S. A. Harvey [broker] may have *submitted* the property, directly or indirectly, while this contract was in force, the commission . . . shall be paid."[24] The court found that the broker had encouraged X to purchase the property and that the owner was aware of these negotiations. In addition, X had actually made a substantial offer for the property. This offer was never accepted, partially due to the

21. *Id.* at 787.
22. See text at note 6, *supra*.
23. 198 So. 389 (La. App. Orl. Cir. 1940).
24. *Id.* at 390 (emphasis added).

fact that the owner did not have marketable title—the owner had been recently widowed and had not yet been sent into possession. The court held that when X subsequently purchased the property within the extension period the owner became liable for the commission.

The court offered no definition of the expression "submitted." It did, however, quote from a prior Louisiana Supreme Court case:

> [The broker's] right to his commission is dependent upon whether he has found and produced one, who is able, ready, and willing to buy on the terms prescribed by his principal. When the broker produces such a purchaser, he is entitled to his commission, although the sale is not consummated, because of the inability of the vendor to comply with the offer.[25]

This reference suggests that the lower court did not actually rely upon the extension clause in reaching the noted result. The implication seems to be that the broker had found a purchaser ready, willing, and able to buy, but the purchaser was delayed because of the vendor's inability to produce a marketable title. Left unanswered was the following question: Does the extension clause allow the broker to recover his commission if the property is sold within the extension period to someone to whom the property was "submitted" (whatever that may mean) even though the prospect was not ready, willing, and able to buy during the listing period? In other words, does this extension clause require less of the broker than would have been required in the absence of such a clause?[26] In *Harvey* the broker's efforts were so clearly the cause of the sale (indeed, he was the "procuring cause," although the court did not use this expression) that the above question was never considered.

Phrase Requiring the Broker to Have "Negotiated" With the Purchaser

A case frequently cited in the context of "negotiation" is a 1926 Louisiana Supreme Court decision, *Bullis & Thomas v. Calvert*.[27] In this case the owner signed a listing agreement authorizing the brokers to find a purchaser for 7,800 acres of land for a price not less than $420,000. The listing agreement was to remain in effect until April 1, 1924, but would be extended for thirty days if at that

25. *Id.* at 390, (citing Mathews Bros. v. Bernius, 169 La. 1069, 1076, 126 So. 556, 558 (1930)).

26. See text at notes 6 & 22, *supra*.

27. 162 La. 378, 110 So. 621 (1926).

time the brokers had produced an interested buyer. The listing agreement also carried an extension clause which provided for the payment of the commission if the property was later sold to anyone with whom the brokers had been *negotiating* during the listing period. *This extenstion clause did not have an expiration date.*

The brokers immediately began negotiations with X, who expressed an interest in purchasing approximately three-fourths of the property—the timbered lands—for $325,000. The broker obtained from the owner a verbal modification of the brokerage agreement, allowing a sale of this portion of the property for the net price of $350,000. Negotiations apparently broke down, and the brokers took no further action in the matter until April 1, the expiration date. They requested the thirty day extension, listing among their prospects the company with which X was associated, but the request for an extension was denied.[28] The owners heard nothing from the brokers for thirty or forty days and on May 12 gave an option for the whole 7,800 acres to a company with whom the brokers had not dealt. This option was never exercised. In July, 1924, the owners contracted with a second broker to sell only the timbered lands. This broker contacted X and in September X's company purchased the property for $350,000. This sale was consummated over five months after the expiration of the first broker's listing agreement.

The Louisiana Supreme Court held that the brokers were not entitled to their commission. The court, quite properly, began by examining the precise language of the listing agreement and the extension clause. The listing agreement read as follows:

> [T]his agreement [is] to remain in effect until April 1, 1924, and if at the end of that time you [brokers] have a good prospective buyer, we [owners] will extend the time thirty days longer. If we should sell said property, or any part thereof, after the expiration of this agreement, to a buyer with whom you had been negotiating prior to expiration of this agreement, we will see that you are paid a commission of five per cent of the sale price.[29]

The court then offered the following interpretation of the extension clause:

> Now that clause is susceptible of but two interpretations: (1) Taken alone, it may mean that, if plaintiffs should have, at any

28. This fact was disputed at trial. 162 La. at 381, 110 So. at 622.

29. 162 La. at 382-83, 110 So. at 622.

> time before the expiration of the contract started negotiations with any person by even so much as offering the property to him, then defendants were to be debarred forever thereafter from selling their property to such person without paying over to plaintiffs 5 per cent of the price received; or (2) taken in connection with the clause which immediately precedes it, it may mean that, if plaintiffs by their efforts had succeeded in so far interesting some person in the property, that at the expiration of the contract he might be considered a likely buyer, then defendants should still pay the commission on any sale made to him, even though not consummated in the thirty days' extension provided for in the contract.
>
> But the first interpretation is clearly not admissible. For a contract must represent the will of both parties; and it is inconceivable that any sane person would bind himself in that manner. So that defendants clearly had no intention to bind themselves to that extent. And we do not understand that plaintiffs so contend.
>
> On the other hand, the alternative interpretation is a reasonable and fair one, and hence must be considered as the common intent of the parties. The more so as it is in strict accord with law, even independent of contract. For this court has always consistently held that a broker who was the procuring cause of a sale would be protected as to his commission against any fraudulent or unfair attempt on the part of his principal to deprive him thereof.[30]

It is obvious that the question facing the court was as follows: What effect should be given to an extension clause which is unlimited in duration? In other states it has been held that in such a case the clause is effective for a reasonable time.[31] Had the Louisiana Supreme Court taken this view, it would merely have had to determine: (a) whether what transpired between the broker and X could be fairly categorized as "negotiations" and (b) whether the ultimate sale occurred within a reasonable time after the expiration of the listing. Instead, the court interpreted the extension clause to mean that the broker was entitled to his commission only if he had produced a "likely buyer" within the listing period. In determining whether someone is a "likely buyer," one must apparently determine whether the broker was the procuring cause of the sale.

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30. *Id.*

31. *See, e.g.*, Moore v. Holman Real Estate Co., 129 Ark. 465, 196 S.W. 479 (1917); Stromberg v. Seaton Ranch Co., 502 P.2d 41 (Mont. 1972).

> The mere fact that the sale may in some degree have been aided by the previous efforts of the broker does not of itself entitle the latter to a commission; i.e., unless it clearly appears that those efforts were in fact the procuring cause of the sale.[32]

Because of the unlimited nature of the extension clause, the court chose to employ the procuring cause (or "likely buyer") test even though the extension clause required only that there have been "negotiations" between the broker and X. Unfortunately, the *Bullis* case has on occasion been cited to mean that the procuring cause test is appropriate even where the extension clause *has* an expiration date. Clearly, this results in a complete negation of the intent of the extension clause.[33] Therefore, it may be suggested that the *Bullis* court would better have served the cause of justice had it simply applied the extension clause for a "reasonable" time. The court could then have devoted its attention to the terms of the contract which only required some kind of negotiations during the listing period.

A very different approach to this same "negotiations" issue was taken by an appellate court in *Englemann v. Auderer*.[34] In *Englemann*, the broker and X had had minimal dealings during the listing. These dealings consisted of one, possibly two, telephone conversations, together with an offer submitted by X. This offer was not accepted by the owner. However, a sale between the two was eventually consumated within the three month extension period.

In finding for the plaintiff-broker, the court conceded that the broker had very little to do with the actual sale to X. Nonetheless, the court felt that what had transpired between the broker and X could fairly be described as "negotiations," which is all the extension clause required. This standard is quite different from that employed in *Bullis*, where the unlimited extension period caused the supreme court to attach a much more restrictive meaning to the expression "negotiate."

The *Englemann* court also differed from the *Bullis* court in that it refused to give an unusual meaning to the provisions of the contract simply because the result might appear unfair. The *Englemann* court stated that "the mere fact that a contract works a hardship

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32. 162 La. at 383, 110 So. at 623.

33. See text at note 4, *supra*.

34. 10 La. App. 136, 121 So. 194 (Orl. Cir. 1929). It is interesting to note that *Bullis* was not cited in this opinion even though it had been decided four years before.

upon one of the parties does not authorize us to set it aside," and continued,

> The parties were capable of consenting, did consent and the object of the contract being lawful, it is a perfectly good private law between the parties, and, however unwise, or, however foolish a man may be to enter into such a contract, the courts do not sit to relieve men of the results of their folly, but sit to enforce private as well as public laws.[35]

A third case in which the term "negotiate" was used in the extension clause was that of *Adair v. Fleming*.[36] During the existence of the listing, the owner gave the broker the names of several prospects, including X, but told the broker not to contact X as he (X) would not be interested in the property. Later, another real estate firm called the broker to discuss the possible sale to X of the property in question. At this point the broker contacted X and tried to persuade him to make an offer, but did not succeed.

Within five days after the expiration of the listing, the broker gave to the owner a list of people contacted by him during the listing (this was required by the extension clause). X's name was included on the list. Two weeks later X moved onto the property as a tenant. On the same day, the owner contracted to sell the property to her brother-in-law, and the next day the brother-in-law sold the property to X.

The court had no difficulty in finding that the broker was entitled to his commission. Unfortunately, the court did not specifically state whether the decision was based on a belief that the seller had perpetrated fraud or a belief that the two meetings between the broker and X constituted "negotiations." At one point the court stated that X was "plaintiff's prospect" (suggesting relief based on contract), but the opinion concluded with the following statement:

> The record as a whole amply justifies the conclusion that there was a studied effort by defendant to defeat plaintiff's right to a commission on the sale of the property after he had spent money advertising it, and time contacting prospects, including [X], in efforts to sell it. We also believe that [X] was trying to help in the plan to avoid the payment of a commission to plaintiff.[37]

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35. 10 La. App. at 137, 121 So. at 195.
36. 68 So. 2d 215 (La. App. 2d Cir. 1953).
37. *Id.* at 219.

The recent case of *Harkey v. Gahagan*[38] involves an extension clause employing the term "submitted" as well as "negotiate." The listing period was twelve months as was the extension period, the latter to become applicable if the property was sold "to anyone with whom said agent or owner had *negotiated* or to whom this property had been shown or *submitted* prior to the termination. . . ."[39]

At the time the listing agreement was signed, the owner told the broker that X was a likely prospect. X had in fact previously offered the owner $150,000 for the property. The broker called X and told him that the property was for sale through his agency for $167,100. X advised the broker that he was not interested. This was the only contact between the two during the listing period. Some five months after the expiration of the listing agreement, X purchased the property (along with an additional 2.14 acres of adjacent land) directly from the owner for $150,000.

In a well-reasoned opinion, the appellate court affirmed the trial judge's judgment for the defendant-owner. In so doing, the court modified two questionable pronouncements of the lower court. The trial court had said that the commission was not owed because the price ultimately paid was less than that asked in the listing and because a different amount of acreage had been sold. The appellate court correctly stated that "[c]ircumstances such as these do not necessarily deprive the realtor of the right to his commission, if he is otherwise entitled thereto."[40] The appellate court also rejected the trial court's prounouncement that the broker must have been the procuring cause of the sale:

> The realtor does not have to be the procuring cause in order to activate the extension clause. He need not have been involved in active negotiation with the purchaser at the time of the expiration of the primary term. However, his activities must have been the cause of creating some minimal interest in the purchaser which contributed to bring about the eventual sale.[41]

In support of this holding, the court quoted common law authorities. Particularly cogent is the following statement from a 1963 California decision: "There must be some minimal causal relationship between

38. 338 So. 2d 133 (La. App. 2d Cir. 1976).
39. *Id.* at 135. (emphasis added).
40. *Id.*
41. *Id.*

the activities of the broker during the listing period and the ultimate sale."[42]

Thus, the *Harkey* case unequivocally repudiates the lingering misconception (caused by previous interpretations of *Bullis*) that a broker can recover his commission only if the ultimate purchaser was a "likely buyer" at the time of the termination of the listing. Instead, all that is required is some minimal causal relationship between the activities of the broker and the prospect's decision to buy. Presumably the necessary activities would be those specified in the extension clause (negotiation, submission, etc.). The *Harkey* case apparently would require the broker to prove two things in order to recover his commission under the extension clause: (1) that he carried on the kind of activity specified in the extension clause, and (2) that the activity created some minimal interest in the purchaser which contributed to the eventual sale.

After applying this "minimal interest" test, the *Harkey* court ruled for the defendant. The court expressed no opinion as to whether the single telephone conversation constituted a "negotiation" or a "submission" of the property. Instead, the court stated that the activities of the broker did not create any minimal interest in X, since X was already familiar with the property (having previously offered to purchase it), had expressed no immediate interest in the property for the price listed, and since more than one year had elapsed between the broker's discussion with X and the ultimate sale.

Phrase Requiring the Broker to Have "Quoted" the Property

There are many cases where the expressions "quote," "had quoted," or "had been quoted" are at issue. In most of these cases the courts have been faithful to the language of the extension clause, allowing the broker to recover even though the "quote" did not result in extensive negotiations.

A frequently cited case is *Ruiz v. Keihm's Pharmacy*,[43] in which a drugstore was listed with the broker. Included in the agreement was a forty-five day extension clause. During the listing the broker was contacted by another drugstore owner (X), who later testified that he was merely curious about the asking prices of neighboring

42. Korstad v. Hoffman, 221 Cal. App. 2d Supp. 805, 35 Cal. Rptr. 61 (1963) (cited at 338 So. 2d at 136).

43. 37 So.2d 720 (La. App. Orl. Cir. 1948).

drugstores. The broker, on the other hand, testified that he was in almost continuous negotiations with X during the listing and was actually able to get the owner to reduce his asking price in order to induce X to purchase the property. The court decided that, in spite of X's protestations, he was more than a disinterested inquirer. In ruling for the plaintiff, the court stated that "[e]ven if it was merely quoted to him [X] by [the broker], we think that under the terms of the contract there would be liability in plaintiff as a result of the ultimate sale to [X]."[44]

The court went on to distinguish the *Bullis* case, which required that X be considered a "likely purchaser." The *Bullis* case was not considered a controlling precedent since the extension clause in that case had no reasonable time limit attached and involved the expression "negotiate," which, in the opinion of the court, obviously meant more than merely "to quote." According to the *Ruiz* court, to "quote" property "means nothing more than to offer it and to state the price asked."[45] To negotiate means to succeed "in so far interesting some person in the property, that at the expiration of the contract he might be considered a likely buyer."[46]

The *Ruiz* decision was cited with approval in the case of *Searcy v. Jacobs*.[47] In this case X noticed the broker's ad in the newspaper and telephoned the broker. The broker said that the price was $135,000. The broker later called X back and said that the price had been reduced to $110,000. This was the only contact between the broker and X, although the broker later obtained the key to the house and gave it to a second broker who showed the house to X. This showing occurred during the extension period as did the eventual purchase.

In finding for the broker, the court approved the *Ruiz* definition of "quote," namely, "to offer it and to state the price asked." Applying that definition to the facts at hand, the *Searcy* court maintained that

> the statement by [the broker] in the original conversation that the owner was asking $135,000.00 for the property, as well as the subsequent call by [the broker] telling [X] that the price had

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44. *Id.*

45. *Id.*

46. *Id.* at 725 (citation omitted). Recall that in the authors' view the construction of the term "negotiate" was unnecessarily restrictive in *Bullis*, due to the fact that the extension period was unlimited. See text at notes 27-34, *supra*.

47. 151 So. 2d 166 (La. App. 4th Cir. 1963).

> dropped to $110,000.00, was a "quoting;" and under LSA-C.C. 1901, the terms of the contract was law to the parties thereto and [the owner] is liable to [the broker] for her commission.[48]

In reaching the stated result, the court may have been influenced somewhat by its belief that the broker had in fact done more than merely quote the property. It was concluded that, by advertising the property, conversing with X, giving X's name to the owner, giving X the address, and actually helping X to see the property, the broker continuously pursued the sale, and thus it was fair that she should receive her commission.

The *Ruiz* decision was distinguished in the case of *Woodworth v. Grubb*,[49] in which the broker and X had no relations whatsoever until one day after the expiration of the listing. X had, though, been shown the property by the owner the day before the listing expired. The owner then directed X to the broker, but the meeting between X and the broker did not occur until two days later, at which time the listing had expired. The question in this case was whether the action of the owner in showing the house could be construed as a "quote" under the extension clause. The court found for the owner and distinguished the *Ruiz* case as follows:

> Suffice it to say that the *Ruiz* case involved a quote by the real estate agency and not the owner and is not applicable here. . . . [W]e are of the opinion that mere mention by the owner of the asking price in response to an inquiry by [X] does not amount to a "quote" envisioned by the contract. On the contrary, this would be a natural thing to do when a prospective purchaser appears to look at a house and make inquiry. The contract itself provides for the referral of a prospective purchaser to the realtor who had an exclusive listing (which was done in this matter), and thus *he* is contemplated as the party who must do the "quoting" and not the owner. Therefore there was no breach of contract by [the owner].[50]

It thus seems clear that a "quote" by the owner does not implement the extension clause, but a "quote" by the broker does. One might criticize the result in *Woodworth* by observing that the owner had, in fact, done more than merely state the price, having actually shown the property to the prospect.[51]

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48. *Id.* at 169.

49. 196 So. 2d 284 (La. App. 4th Cir. 1967).

50. *Id.* at 288.

51. This problem of direct negotiation by the owner will be considered in a subsequent section. See text at note 88, *infra*.

Caruso-Goll v. La Nasa[52] and *Alex F. Dreyfus Co. v. Friedman*[53] are two cases in which the expression "quoted," though used in the extension clause, was not a significant factor in the courts' decisions. In *Caruso-Goll*, the broker had been negotiating with X, and during the extension period the property was sold to X's mother. It was held that for purposes of this case negotiating with X during the listing was equivalent to negotiating with the eventual purchaser; X had acted as his mother's agent in the past and she frequently relied on his advice in matters of real estate. The court did not discuss what the expression "quoted" might require of a broker, citing only a case involving the procuring cause doctrine.[54]

In *Dreyfus*, the court concluded that X had "negotiated" for the property during the listing period. Since the extension clause required only that a "quote" have occurred, one might surmise that, in this court's opinion, a "negotiation" necessarily involves a "quote" of the property by the broker. The court did point out that there was a considerable difference between this case and those cited by defendant-owner's counsel in which the listing did not include an extension clause.[55] The court recognized that the extension clause gave the broker rights which would not have otherwise existed and that no good reason could be found "why [the owner] should not be bound by that stipulation in her contract."[56]

Coppage v. Camelo[57] is one case in which the expression "quoted" was used in the extension clause and yet the broker was unable to collect his commission. In this case the purchaser was an adjacent landowner who had long been interested in buying the property. When contacted by the broker, X said that he did not want to buy through an agent. He said, "You don't need to talk to me, about the land next door, I know all about it . . . there is no way that I am going to buy it through a real estate agent. . . ." The court stated that under no circumstances could it be said that the broker found this buyer. Insofar as the exact language of the extension clause was concerned, the court said that "quoted" means that the price must at least have been stated. Apparently X did not allow the broker to get even that far. This case might be compared to *Harkey*

52. 72 So. 2d 13 (La. App. Orl. Cir. 1954).

53. 171 La. 90, 129 So. 679 (1930).

54. 72 So. 2d at 16. The cited case was *Cruse v. Bruscato*, 28 So. 2d 56 (La. App. 2d Cir. 1946). See text at note 6, *supra*.

55. 171 La. at 94, 129 So. at 679.

56. 171 La. at 93, 129 So. at 680.

57. 330 So. 2d 695 (La. App. 4th Cir. 1976).

v. Gahagan,[58] in which the extension clause used the expressions "negotiate" and "submit." The defendant was successful in *Harkey* because, even though there may have been a "submission" of the property, the purchaser was already familiar with it and did not have his interest quickened by the efforts of the broker. It might therefore be deduced that even had the broker in *Coppage* been able to state the asking price, he would not have been entitled to his commission, since the quote would not have inspired any minimal interest which did not already exist.

Phrase Requiring the Broker to Have "Interested" Purchaser in the Property

Many extension clauses today (four out of the ten examined) use the "interested" expression. Surprisingly, only two reported decisions deal with this type of clause, and neither offers any definition of "interested." Instead, the decisions seem to suggest that this language requires that the broker be the procuring cause of the sale. For the reasons previously given, however, the procuring cause doctrine should be applicable only in the *absence* of an extension clause.[59]

In *Cramer v. Guercio*,[60] the agreement contained a six-month extension clause, but the court found the clause inoperative since the property was later listed with a second broker.[61] Thus, the court quite properly devoted considerable time to the question of procuring cause. Unfortunately, the court failed to make it clear that the procuring cause doctrine was considered relevant only because it was found that the extension clause was without effect. In a subsequent case, *Carter v. Hayes*,[62] the *Cramer* precedent was misapplied. In ruling for the defendant, the *Carter* court, citing *Cramer*, made the following statement: "The mere fact that the sale may have been in some way aided by the efforts of the agent does not alone entitle the agent to his commission. 'Interesting a purchaser' is often referred to in our case law as 'procuring cause.'"[63]

The problems with the *Carter* decision are apparent. The court in *Cramer* discussed procuring cause only because it felt the extension clause had been voided when the second listing agreement was

58. See text at note 38, *supra*.
59. See text at note 6, *supra*.
60. 331 So. 2d 550 (La. App. 1st Cir. 1976).
61. This question is discussed in a subsequent section. See text at note 94, *infra*.
62. 337 So. 2d 295 (La. App. 2d Cir. 1976).
63. *Id.*

made. It is most illogical to assert that a broker who has an extension clause allowing a commission if he merely "interests" the eventual purchaser has no greater rights than a broker who is without such protection and who must prove that he "procured" the sale. If the *Carter* precedent is accepted, then extension clauses using that expression are virtually useless. Such a result would be irrational and unfair, especially since one might reasonably believe that the "interested" expression should be the most liberally interpreted of all those used in extension clauses. "Quoting" property or "negotiating" for a sale clearly requires some contact between the broker and the purchaser, but it is conceivable for a purchaser to have become "interested" in a listed property through a broker's advertising efforts without any actual contact between the parties.

There is, of course, no doubt that the cited language in *Carter* is logically and legally unsupportable. Unfortunately, the Louisiana Supreme Court denied writs in the case, stating that "on the facts found by the Court of Appeal, there is no error of law in its judgment."[64] This statement can perhaps be explained by noting that the plaintiff broker won the case at the appellate level; he was able to prove that he was the procuring cause of the sale. If he was the procuring cause, then surely he "interested" the purchaser in the property. On that factual basis the decision is correct. It is difficult to believe that the supreme court meant to sanction the appellate court's equating of "procuring cause" with "interesting."

OBLIGATIONS IF THE SALE IS COMPLETED AFTER THE EXPIRATION OF THE EXTENSION CLAUSE

As noted earlier the procuring cause doctrine is applicable in the absence of an extension clause.[65] There are two other situations in which this doctrine becomes relevant. The first situation occurs when the broker has been given a non-exclusive agency (sometimes described as an "exclusive agency to sell"). In this situation the broker is not entitled to a commission if the owner sells the property himself. Thus, it must be determined which of the two parties (broker or owner) is to receive credit for the sale. Since almost all listing agreements today provide for the payment of the commission even if the owner completes the sale himself (an "exclusive right to sell"), this situation will not be considered in this article.

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64. 339 So. 2d 854 (La. 1976).

65. As has been seen, some courts incorrectly apply it even where there is an extension clause. See text at notes 22, 26, 33, 54 & 62, *supra*.

The second situation for which the procuring cause doctrine is relevant occurs when, subsequent to the *expiration* of the extension clause, the property is sold by the owner to someone who had previously bargained with the broker during the listing period. In this instance the broker may no longer rely on the protection afforded him by the extension clause, since it has now expired. Having no contractual protection, he must rely upon the same argument employed by brokers whose listing agreements do not include extension clauses; that is, justice requires that compensation be paid for those services of which the owner availed himself.[66]

In *Hamberlin v. Bourgeois*[67] and *Womack Agencies v. Fisher*,[68] the brokers were successful in collecting their commissions. In *Hamerlin*, the listing agreement was for ninety days with a sixty-day extension clause. The purchase was completed twenty-four days after the expiration of the extension period. In reversing the holding of the district judge, the appellate court found that, while there was no evidence of collusion between the owner and X to deprive the broker of his commission, the broker was the procuring cause of the sale and was thus entitled to the commission. During the primary term of the agreement, the property was shown by the broker to X. X expressed a desire to purchase the property, and the broker assisted him in filling out an F.H.A. loan application. Approval of the loan was delayed due to a shortage of F.H.A. funds and did not occur until both the primary and the extension periods had expired. The sale was concluded shortly thereafter at a price of $93,000, rather than the original asking price of $95,000. In finding for the broker, the court recognized that even though a broker may have been of some assistance in bringing parties together, he is not entitled to a commission when negotiations have ceased and the owner himself reopens negotiations and completes the sale. In this case, however, there was no cessation of negotiations, but rather a continuous, uninterrupted transaction.[69]

In discussing whether the broker was the "procuring cause" of the sale, the court pointed out that the buyer approached the broker and expressed an interest in buying a "place." The broker showed the property in question, assisted in the appraisal by F.H.A., and helped the buyer apply for the loan. The court had no doubt that the broker was ultimately responsible for the sale.

66. See text at note 6, *supra*.
67. 289 So. 2d 358 (La. App. 1st Cir. 1973).
68. 86 So. 2d 732 (La. App. 4th Cir. 1956).
69. See text at note 22, *supra*.

In the *Womack* case, the property was sold only two days after the expiration of the extension period, and there was some evidence that the parties had informally agreed to the sale during the extension period. The buyer testified that he had been interested in buying the property before it was listed with the broker, but the court found that this interest had been minimal. The testimony revealed that upon termination of the primary term on September 22, 1953, the broker was requested to continue negotiations with X. On October 8, X offered $20,350 for the propery, which was rejected. On October 24 (two days after the expiration of the extension period) X and the owner agreed to a sale price of $20,000. The court said that:

> "[p]rocuring cause" refers to the efforts of a broker in introducing, producing, finding, or interesting a purchaser, and means that negotiations which eventually lead to a sale, must be the result of some active effort of the broker.[70]

In this case the court found that the broker was the "procuring cause" in that he had attempted to interest about twenty prospects in the house, had secured an F.H.A. appraisal at his own expense, had conducted extensive negotiations with the eventual purchaser (even, at the owner's request, beyond the listing period), and had in fact secured an offer which was $350 *greater* than the price for which the property was subsequently sold.

In both *Hamerlin* and *Womack* it was apparent that owner and buyer were quite close to consummating a bargain when the listing period expired and that the contracts which did result were virtually identical to those negotiated by the brokers. These facts were not present in those cases where the brokers were denied commissions. In *Gardner v. Fonseca*,[71] the property was sold two months after the forty-five day extension period had expired. The eventual purchaser had made an offer during the listing period, but it was rejected by the owner partially because the price was too low and partially because the offer was conditioned upon the buyer being able to sell his own house. The offer which was ultimately accepted did not have the above condition, and was $1,500 higher than the first offer. In finding that the broker had not earned his commission, the court stated:

> Counsel argued that plaintiff was the procuring cause of the sale, but according to our understanding of the meaning of the term, we do not think so. For the broker to be regarded as the

70. 86 So. 2d at 734.

71. 85 So. 2d 524 (La. App. Orl. Cir. 1956).

> procuring cause, the negotiations which eventually lead to the sale must be the result of some active effort on the part of the broker. . . . The only effort put forth by the broker in the instant case was to submit a purchase offer from one who was then not ready or able to buy defendant's property, and after the offer was rejected by defendant, the whole matter seems to have been abandoned by plaintiff and defendant. We do not believe that the listing contract contemplated that the real estate agent would be entitled to a commission for producing a prospective purchaser who is neither ready nor able to buy and who cannot and does not make a firm offer to purchase until a date after the contract with the real estate agent has expired.[72]

Langford v. Pioneer Land Company[73] is a case involving the sale of leasehold rights. The listing period was only ten days with a sixty-day extension. The eventual purchaser had originally been shown the property by the broker, but later bargained directly with the owner. These negotiations were terminated when the owner gave a second purchaser a one and one-half month option on the property. When that purchaser failed to exercise his option, negotiations were re-opened with X, and a sale of the leasehold occurred about one month after the expiration of the extension. The court failed to discuss the question of procuring cause, but did hold that there was no evidence of collusion or an intent to deprive the broker of his fee. It seems apparent that the eventual sale was not the result of on-going negotiations and that even had the plaintiff argued "procuring cause" more vigorously (as opposed to claiming fraud and bad faith) he could not have succeeded.

In *Mathews v. Cacioppo*,[74] property listed with a broker was leased to X for six months, with an option to purchase. Three months after the *lease* expired, X finally decided to purchase the property, the owner agreeing to accept the same price quoted in the option. The eventual sale occurred long after the forty-five day extension period had expired. The court found that there was no evidence of collusion between the owner and the buyer. The court also accepted as true X's testimony that he had abandoned the idea of purchasing the property and had subsequently purchased it only as a result of new and independent negotiations with the owner. The court ruled that

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72. *Id.*
73. 250 So. 2d 165 (La. App. 1st Cir. 1971).
74. 172 So. 584 (La. App. Orl. Cir. 1937).

> [t]he mere fact that the sale was made to a prospect obtained by [the broker] is not sufficient to entitle him to a commission on a sale effected by [the owner] after the expiration of the time limit in his contract in the absence of any showing of collusion or that plaintiff's efforts were the procuring cause of the sale.[75]

The recent case of *Sleet v. Harding*[76] also involved a sale subsequent to the expiration of an extension clause. The owner entered into two listing agreements with the broker, the first commencing in 1973, and the second commencing in January, 1976, and expiring in July of the same year. There was an extension period which ended ninety days later, in October of 1976. In June, 1975, the house had not been sold, and in order to derive some income from the property the owner decided to rent it to X. In July, 1977, nine months after the expiration of the extension clause on the second contract, X decided to purchase the property. The broker then claimed his commission on the basis of his attempt to interest X in purchasing the property at the time he was a tenant—the broker had obtained a verbal offer from X during the listing period. The appellate court rejected this claim, citing with approval the written reasons of the trial judge:

> [A]ll plaintiff has proved to the court is that he made an unsuccessful attempt to sell [the owner's] house in 1975 to persons who were already living in the house. After these negotiations broke down, plaintiff had contact with the buyers by acting as defendant's rental agent. More than two years later defendant initiated entirely new negotiations directly with the buyers, without any participation by plaintiff, and sold the home under completely different terms than those proposed two years earlier. Under these circumstances plaintiff's actions cannot be considered the procuring cause of the sale. Thus plaintiff is not entitled to a commission.[77]

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75. *Id.* at 586.

76. 383 So. 2d 122 (La. App. 3d Cir. 1980).

77. *Id.* at 124. The trial judge also found that:

> Other testimony offered at trial led this court to believe that plaintiff was not the procuring cause of sale. One thing is that the alleged offer made by [X] through [the broker] was not put in writing, although to do so is mandatory industry caustom [*sic*]. Another is that plaintiff never "registered" [X] [as a buyer], although plaintiff testified that it is customary in the realty business to do so. Also, plaintiff denied being involved in negotiations of any kind with [X] when questioned by Rod Noles, another broker who was trying to sell the house in May of 1977. This denial by plaintiff was made at the very time that defendant and [X] were negotiating their deal.

In summarizing these decisions, one need only restate the observations made when reviewing the procuring cause doctrine.[78] In order to recover his commission, the broker must be able to show that he set in motion an uninterrupted sequence of events that eventually resulted in the sale of the property to the prospect originally produced by him. This means that the negotiations must have been started by the broker during the listing period and continued by the owner throughout the extension period and beyond. The more lengthy the extension period, the more difficult the task of proving the continuous nature of the negotiations. In those cases in which the broker was able to collect his commission, the sale was completed shortly after the extension period expired. This seems to have aroused in the court a suspicion of fraud on the part of the owner, making it somewhat easier to rule that the commission should be paid.

MISCELLANEOUS PROBLEMS

Time Considerations in Determining the Applicability of Extension Clauses

It is obvious that, in order to recover under the listing agreement, the described activity must have been conducted by the broker during the listing period.[79] In addition, the sale must have transpired within the extension period or very soon after its expiration. In many of the cases previously discussed, there was some question as to whether these time constraints had been met. Two cases in this area with particularly interesting facts are *Zollinger v. Gust*[80] and *Cary v. Humble*.[81] The *Zollinger* case holds that a *verbal* agreement to sell, confected within the extension period, is sufficient to implement the extension clause. The court gave no attention to the argument that verbal agreements to buy and sell immovables are not enforceable. Furthermore, the court took into consideration neither that the verbal agreement was conditional upon the purchaser's obtaining a specified loan nor that the act of sale was passed after the extension had expired. So long as it could be proven that the agreement was entered into (verbally or otherwise) during the extension, the broker's commission was due.

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78. See text at note 22, *supra*.
79. *See* Woodworth v. Grubbs, 196 So. 2d 284 (La. App. 4th Cir. 1967).
80. 192 So. 132 (La. App. Orl. Cir. 1939).
81. 212 So. 2d 439 (La. App. 2d Cir. 1968).

In *Carey v. Humble* the owner listed his property for three months (expiration date: July 15, 1965). The agreement was later extended to August 15. Each of the contracts contained a six-month extension clause. During the period of the first contract the realtor showed the property to X, who showed no interest at that time. His interest was aroused in January of 1966, whereupon he called the broker about the property. Having been told that it was no longer being listed, X contacted the owner, and on January 16, 1966, an agreement was reached for the sale of the property. This was six months and one day after the expiration of the first listing, but within the extension period of the second listing.

The court held that, since there had been no contact between the broker and X during the period of the second listing, the second listing agreement was totally irrelevant. In addition, the court specifically held that there had been no collusion between the owner and X to deprive the broker of his commission. This conclusion is supported to some extend by the fact that in January X contacted the broker when his interest was renewed. On the other hand, the fact that the parties completed their sale only one day after the expiration of the extension period might appear suspicious to some. Nonetheless, as a result of its analysis, the court denied the commission on the grounds that the extension period had expired prior to the sale.

It is somewhat surprising that the *Carey* court did not give greater attention to the question of whether the extension clause should have run from August 15 rather then July 15, in which case the sale would have occurred within the extension period. According to the court's analysis, the parties might be said to have entered into two entirely distinct contractual relations. However, in light of the fact that the language of the two contracts was identical (except for the expiration dates), one might argue that the second agreement was intended only to *extend* the original listing from three months to four rather than to create an entirely separate obligation. There would then be a single listing period of four months duration, and the extension clause would apply to all prospects contacted by the broker within the four month period. This interpretation would appear to be more in line with the reasonable expectations of the parties.

In *Gaspard v. Siggio*,[82] the owner entered into a listing agreement with the broker in which he agreed to pay the broker a com-

82. 313 So. 2d 380 (La. App. 3d Cir. 1975).

mission of ten per cent upon the sale of 160 acres of land; there was also a ninety-day extension period. The broker was paid his commission on a portion of the property sold within ninety days after the termination of his contract, but it was held that the broker was not entitled to commission on the sale of the remaining acreage since that portion was not sold until after the extension period had expired.

Finally, it should be recalled that the supreme court in *Bullis & Thomas v. Calbert*[83] interpreted an extension clause without an expiration date as requiring that the broker produce, during the primary period, a purchaser who could be described as a "likely buyer." As noted by an appellate court in *Ruiz v. Kiehm's Pharmacy*,[84] this essentially negates the effect of the extension clause. The courts in other states generally have not taken this approach, but have instead enforced the clause according to its terms for a "reasonable" time.[85]

The Effect of the Termination of a Listing Agreement on an Extension Clause

In *Tharp v. Tracy*,[86] the listing period was set for forty days to be followed by a six-month extension period. During the listing period the broker exhibited the property to X. X made an offer of $9,250, which was not accepted by the owner. A short time later the listing was cancelled by mutual agreement of the broker and owner. Sixteen days after the cancellation the owner sold the property to X for the price of $9,250.

Saying that the termination of a listing contract did not in effect also terminate an extension clause connected therewith, the court held that the broker was entitled to a commission on the sale. The court states that to *rescind* a contract is to undo it from the beginning. What occurred here was a *termination*, an abrogation of only so much of the contract as remains unperformed; "[t]o constitute an abandonment of rights, *an actual intent to abandon must exist*."[87] In essence the listing agreement was not abrogated entirely, only modified as to the expiration date.

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83. See text at note 27, *supra*.
84. See text at note 43, *supra*.
85. See note 31, *supra*.
86. 40 So. 2d 509 (La. App. 2d Cir. 1949).
87. *Id.* at 511 (citing 17 C.J.S. CONTRACTS § 412 at 899).

The Effect of Direct Negotiations by the Owner During the Listing Period

Most listing contracts are exclusive, requiring that all potential purchasers be directed to the broker. One would thus assume that, if the owner himself should carry on a designated activity (quoting, negotiating, submitting, etc.), the broker should receive the benefit of that service for the purpose of implementing the extension clause. As demonstrated by *Woodworth v. Grubb*,[88] this is not always the case. Recall that in *Woodworth* the owner had actually shown a prospect the house the day before the listing expired. The court said that the implication of the extension clause was that the broker, not the owner, must make the quote. This decision is not quite so harsh (from the broker's perspective) as might appear at first blush, since the owner did refer X to the broker. By the time X actually met with the broker, however, the listing had expired. One might surmise that the outcome might have been different had the owner neglected to refer the prospect; this might have been construed as contractual breach, resulting in liability.

Two cases in which the brokers were allowed their commissions as a result of the owner's activities were *Doll v. Thornhill*[89] and *Coppage v. Woodward*.[90] In *Doll*, the parties executed a six-month listing agreement in which the owner agreed to refer all applicants to the broker. *There was no extension clause*. It seems that during the listing period the owner struck a bargain with X, in which it was agreed that if the broker could not sell the property during the listing, the owner would sell it to X. This is precisely what occurred three weeks after the listing expired. The court found for the broker, holding that the owner had breached the contract. It was stated that the broker should have been given at least the opportunity to complete the sale. In addition, it was deemed possible that the broker may have influenced the buyer indirectly by means of his advertising efforts. The court said, however, it was not necessary for the broker to prove that his efforts produced the sale: The listing contract was exclusive, therefore the broker should reap the benefits of the owner's marketing efforts.

The *Coppage* case did involve an extension clause, which employed the term "quoted." Once again there were negotiations between the owner and X during the listing, but in this case it ap-

88. See text at note 49, *supra*.
89. 6 So. 2d 793 (La. App. Orl. Cir. 1942).
90. 105 So. 2d 306 (La. App. 1st Cir. 1958).

pears that the broker also had contact with X and may actually have shown him the house on one occasion. Regardless of the resolution of this disputed fact, the court said that the main consideration was that the owner did not direct the prospect to the broker as he was required to do under the contract. Citing *Doll v. Thornhill*, the *Coppage* court held that in such circumstances the commission must be paid.

A case decided four years after *Coppage* had quite a contrary result. In *Acadian Investment Co. v Laird*,[91] there was a three and one-half month listing agreement for the sale of a 1,275 acre plantation. There was also a one year extension clause. During the listing the owner agreed to sell one-half of the acreage to X if the broker was unable to sell the whole during the listing. The owner never referred X to the broker, but the broker learned indirectly of the negotiations and met with X to offer his assistance. The broker made no actual attempt to sell X the property and, in fact, did not identify himself as the owner's agent.

Two weeks after the expiration of the listing, the owner sold an 800-acre portion of the tract to X. When the broker sued for his commission, the court conceded that the plaintiff had presented a strong case, but it nonetheless ruled for the defendant. The court attached great significance to the fact that the broker had learned of the negotiations with X and had actually met with him. It was therefore concluded that the owner's breach had not adversely affected the broker: He had been given every opportunity to complete the sale with X and had failed to so do.

This approach clearly is quite different from that taken by the *Coppage* court, which emphasized the owner's contractual breach in failing to refer the prospect to the broker. In *Acadian*, the focus is upon the broker. The implication is that, regardless of the owner's transgressions, the broker should not be awarded his commission unless he makes some reasonable effort to effect a sale. Citing with approval the opinion of the trial judge, the *Acadian* court stated that

> plaintiff was not deprived, by reason of [the owner's] breach of contract, of the opportunity to sell to his prospect. The reason for the rule failing, then the rule itself must fail, with the result that the plaintiff cannot recover. . . .[92]

In reading the decision one might surmise that the true reason

91. 138 So. 2d 429 (La. App. 3d Cir. 1962).
92. *Id.* at 432.

for the court's ruling was its reluctance to award a very sizable commission to a broker whose efforts to sell the property were rather minimal. In addition, the court seemed desirous of limiting its decision to the precise facts of the case at hand, concluding that "the defendants are not liable for the real estate agent's commission under the *particular* circumstances reflected by this record. . . ."[93] No attempt was made to distinguish the case from *Coppage v. Woodward.*

In reviewing the cases noted in this section, it can be seen that a critical factor is the owner's referral of the prospect to the broker. The *Doll* and *Coppage* cases suggest that if this does not occur, the commission is owed. The *Acadian Investment Co.* case qualifies this result by holding that if the broker should learn indirectly of the existence of the prospect, he must make some reasonable effort to quicken the prospect's interest. This conclusion is not entirely supported by logic nor by the *Coppage* precedent, but the *Acadian* court may have been influenced by the unusual facts of that case.

Denial of Brokerage Fee if a Second Broker is Hired During the Extension Period

In both *Englemann v. Auderer*[94] and *Alex F. Dreyfus v. Friedman,*[95] the respective courts allowed the plaintiff-brokers to recover their commissions even though the owners had subsequently listed the property with second brokers. The owners were required to pay two commissions. Neither court gave any attention to this problem. The unexpressed philosophy seemed to be that if a seller has dealt with two brokers, both of whom have become entitled to a commission by the wording of their contracts, the seller should be liable to both. If such were not the case, one realtor would be unjustly deprived of the efforts of his labor. Although double payment creates a hardship upon the owner, the *Englemann* court noted (albeit in another context) that "the mere fact that a contract works a hardship upon one of the parties does not authorize us to set it aside."[96]

The only Louisiana case in which the subsequent listing problem is discussed directly is *Cramer v. Guercio.*[97] The court in this case held that, contrary to the precedent set in *Englemann* and *Dreyfus,*

93. *Id.*
94. 10 La. App. 136, 121 So. 194 (Orl. Cir. 1929). See text at note 34, *supra.*
95. 171 La. 90, 129 So. 679 (1930). See text at note 53, *supra.*
96. See text at note 35, *supra.*
97. 331 So. 2d 550 (La. App. 1st Cir. 1976). See text at note 60, *supra,* where this

the subsequent listing of the property with a second broker serves to *cancel* the extension clause. In reaching this conclusion the *Cramer* court was impressed with the testimony of several witnesses, qualified in the real estate profession, to the effect that the purpose of the extension clause was to protect the broker from a private sale by the owner subsequent to the listing, and the clause had no application if the property was listed a second time.[98] The court observed that the listing form in question had been prepared by real estate agents, rendering the interpretation by the defendant's witnesses (local agents) especially persuasive. Finally, the court noted that if the clause was applicable, the owner could be liable for multiple commission and "sanctioning such a result is an absurdity."[99] As has been noted, several courts in the past have ordered exactly this kind of double payment. The *Cramer* court was the first to perceive this as an injustice.

It might be observed that following this decision the listing form recommended by the Board of Realtors in that particular parish was changed and now specifically provides that the extension clause should be *inoperative* if the property is subsequently listed with another broker. Of the ten listing forms examined which contained an extension clause, seven had such a provision; three did not. The *Cramer* precedent suggests that trial courts should solicit testimony from local experts to determine the custom of the particular areas in which these forms are used.

SUMMARY AND CONCLUSIONS

When a listing agreement contains an extension clause, it becomes the task of the judiciary to enforce that provision as the law between the parties or to declare the provision unenforceable as contrary to public policy.[100] Those courts which steadfastly apply the procuring cause doctrine despite the presence of an extension clause fail to shoulder this burden. A cursory examination of the extension clause should immediately reveal that the broker in no way obligates himself to be the procuring cause of the sale; it is necessary only that the purchaser be one to whom the property was quoted or submitted by the broker, with whom negotiations have transpired, or who has become interested in the property through

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case is discussed in connection with the expression "become interested" as used in the extension clause.

98. The plaintiff-broker's argument that this testimony was inadmissible under the parol evidence rule was rejected. *Id.* at 553.

99. *Id.* at 554.

100. This latter argument has never been advanced strenuously.

the broker's efforts. It is also reasonable to require the broker's designated activity to have created some minimal interest on the part of the purchaser.

A related difficulty is the frequent failure of Louisiana courts to recognize that the actions of the broker should be measured against the dictates of his contract. If the contract requires "negotiations," for example, that term should be defined and there should then follow an inquiry as to whether the broker's actions satisfied his obligation as specified in the contract and defined by the court. In addition, it should be recognized that many cases may be unreliable or inapplicable due to the differences in the terminology of the two extension clauses. Where contractual terminology differs, it should be presumed that obligations also differ.

Insofar as the drafting of an extension clause is concerned, it appears that the expresion "quoted" has been contrued as requiring the least amount of contact between the broker and the purchaser. It has been specifically held that to "quote" property means merely to offer it and to state the price asked, whereas to "negotiate" means to produce someone who might be considered a "likely buyer."[101] One might suppose that the broker would be afforded maximum protection if the extension clause required merely that he "interest" a purchaser, but a recent appellate court decision equates this expression (perhaps incorrectly) with "procuring cause," the most stringent standard possible.[102] In light of this uncertainty, an extension clause combining several of the common expressions might be desirable. Consider the following proposed language, for example:

> . . . to any purchaser to whom said property has been quoted or who has become interested in said property as a result of the efforts or advertising of said REALTOR. . . .

This particular extension clause, combining the expressions "quoted" and "interesting a purchaser," might afford the greatest protection to the broker. The former expression is desirable since it has been given a very liberal interpretation by Louisiana courts. Although the latter phrase has been given a narrow meaning, it would seem to require a minimal amount of contact between the broker and the eventual purchaser and, when combined with "quoted," might achieve a result beneficial to the broker.

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101. This is how the *Ruiz* court interpreted the *Bullis* case, although as has been said the *Bullis* court gave a very strict meaning to "negotiate" because the extension clause had no expiration date. See text at notes 45 & 46, *supra*.

102. *See Carter v. Hayes*, discussed at note 62, *supra*.