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The Law of Real Estate Brokerage Contracts: The Broker's Commission

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COMMENT

THE LAW OF REAL ESTATE BROKERAGE CONTRACTS: THE BROKER'S COMMISSION

Introduction

Since 1920,[1] Louisiana real estate brokers have been governed by a detailed brokerage statute, today known as the Louisiana Real Estate License Law[2] which, among other things, regulates their training,[3] qualifications,[4] and business conduct.[5] The statute, however, does not purport to define comprehensively the extent or sufficiency of the brokerage services which a broker[6] must complete in order to earn a brokerage commission.[7]

In the absence of complete legislative guidance, the elusive issue of whether, under a given set of factual circumstances, a real estate broker has earned a commission has necessarily been extensively litigated. As a result, there has evolved a large body of fairly comprehensive, albeit generalized, jurisprudential "rules" which govern the vesting of commission rights under brokerage contracts. It often appears, however, that these "rules" are being applied inconsistently in cases that seem to be factually similar. These apparent inconsistencies have resulted in a lack of certainty and predictability

1. The statutory predecessor of the current Louisiana Real Estate License Law was Act 236 of 1920.

2. LA. R.S. 37:1431-64 (1950 & Supp. 1979).

3. LA. R.S. 37:1459-60 (1950 & Supp. 1978).

4. LA. R.S. 37:1437 & 1440 (1950 & Supp. 1979).

5. LA. R.S. 37:1449 & 1455 (1950 & Supp. 1979).

6. Unless otherwise stated, the term "broker" refers to a real estate broker.

7. At most, the Louisiana Real Estate License Law has only an incidental regulatory effect on whether a commission is due to a broker. *See, e.g.*, LA. R.S. 37:1445 (1950 & Supp. 1978) (providing that a person must be licensed as a real estate broker in order to file suit for the recovery of any compensation for real estate brokerage services).

regarding the rights of real estate brokers, which in turn has caused continuing excessive litigation over commission rights.

The apparent inconsistencies, however, are often reconcilable when the underlying assumptions, hidden factors, unwritten rules, and implied conditions which may have dictated the legal result in a given case are exposed. Thus the confusion on the part of brokers regarding their rights to a commission exists, not because Louisiana does not have an extensive jurisprudential brokerage law governing that employment relationship, but because this body of law has never been compiled into a single, cohesive, systematic statement. It is the purpose of this comment to expose and examine the operative legal principles upon which brokerage commission issues are decided, to restate the jurisprudential brokerage law as it relates to the vesting of commission rights, and to analyze the incidental effects of the Louisiana Real Estate License Law on the regulation of real estate commissions.[8]

A real estate broker is a licensed person who, for a fee, commission, or other compensation, contracts to perform brokerage services for another in transactions dealing with real property. The employer of a broker is sometimes loosely referred to as the broker's "principal" and, conversely, the term "broker" is often used synonymously with "agent."

However, it should be emphasized that although a listing agreement may appear to give a broker authority to sell, it is universally understood that it is *not* a contract of mandate, or agency, but is merely an employment contract by which the broker agrees to locate a person who is ready, willing, and able to buy or sell and with whom the employer may do business. Absent express language in the brokerage contract to the contrary, the broker is *not* regarded generally as being clothed with the power to create a binding contract or juridical act without final written approval by the employer.[9]

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8. The scope of this comment does not include an analysis of the potentially negative effects which a broker's conduct may have on his right to commission, except as mentioned incidentally in connection with discussions relating to the affirmative acts required of a broker in order to earn a commission.

9. Leggio v. Realty Mart, Inc., 303 So. 2d 920, 923-24 (La. App. 1st Cir. 1974) ("[A] real estate broker, absent a special agreement, has no authority to bind his principal, or to negotiate on his behalf. The real estate broker renders a service by advertising and showing properties which are for sale, and by giving advice or recommendations to his client"); Blythe v. Hall, 169 La. 1120, 126 So. 679 (1930) (holding that the broker with whom the owner had listed property was not authorized to enter into a contract of sale on her behalf, but merely to *find* a purchaser. The court distinguished

As a general rule, the broker earns compensation only when he[10] successfully procures a customer, usually a purchaser,[11] who is ready, willing, and able to complete the transaction at a price and on terms and conditions which are stipulated in the listing agreement or which are otherwise consented to by the "principal" or employer.[12]

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a broker's colloquial "agency to sell" from a true "power of attorney" stating that the ordinary "agency to sell" given to a broker in a listing agreement is *not* a "power of attorney" giving the broker the power to enter into real estate transactions in the owner's name); Hoggatt v. John, 185 La. 227, 169 So. 69 (1936) (authority to lease given to a broker is not an actual power of attorney to lease for the principal, but merely means that the broker has authority to bring prospective lessees to the principal for approval); Trentman Co. v. Brown, 176 La. 854, 864, 147 So. 14, 17 (1933) ("Plaintiffs are real estate brokers and had written authority from the owners of the lots of a subdivision to 'sell said lots . . . .' But they were not authorized to execute deeds . . . . Paragraph 7 of the contract provides that: 'The owner agrees to execute all deeds by warranty deed . . . , and hereby authorizes the agents to execute for him *contracts* of sale on terms as provided . . . .' This contract conferred upon these [selling agents the] power and authority to sell the property in the sense only that they were to find purchasers and make sales contracts with them . . . , the deeds to be executed by the owner . . . . This written instrument is a power of attorney to sell real estate [only] in the sense the term 'to sell' is ordinarily used in real estate broking contracts"); Tomlinson v. Allen, 152 La. 41, 46, 92 So. 727, 729 (1922) ("[T]he power to sell must be express and special. . . . The listing of the property with the broker for sale . . . conferred no such power." The court held that the broker was authorized only to find a purchaser, not to bind the principal to sell, especially where a right was reserved to sell through other agents or directly through the principal himself).

Note, however, that Louisiana courts continue to refer loosely to the broker-seller relationship as one of agency. *See, e.g.*, Saturn Realty, Inc. v. Muller, 196 So. 2d 321, 323 (La. App. 4th Cir. 1967) (court granted recovery of a brokerage commission under the rationale that "the principal shall not be permitted to enrich himself at the expense of the agent").

10. Except with reference to actual cases, brokers in general will be referred to in the masculine gender, for the sake of convenience.

11. There are numerous varieties of transactions for which a broker may be employed. The emphasis in this comment, however, is placed on sale transactions, the most common type, unless otherwise indicated. The use of sale transactions, however, is merely exemplary, and the brokerage rules which apply to sale transactions apply by analogy to other types of real estate transactions, unless otherwise indicated.

12. Lambert v. Brucker, 330 So. 2d 640 (La. App. 4th Cir. 1976) (court denied quantum meruit where the broker had not earned a commission); Pumilia v. Dileo, 169 So. 2d 581 (La. App. 4th Cir. 1964) (brokerage commission is earned only upon the happening of a contractually defined contingency, *i.e.*, the successful performance of the intended brokerage services. Anything less does not give the broker a right to a commission. There can be no quantum meruit recovery on brokerage contracts); Oldham v. Jones, 136 So. 2d 310 (La. App. 2d Cir. 1961) (if an express contract exists, it is the sole basis on which a broker may claim a commission. There is no quantum meruit recovery in brokerage contracts). *But see* Gauquin, Inc. v. Spring, 316 So. 2d 858 (La. App. 1st Cir. 1975) (quantum meruit was granted despite the fact that a brokerage con-

A listing agreement, or brokerage contract, for the sale of real estate is one in which a broker is employed to locate prospective purchasers for one or more designated parcels of real property. A broker who is so authorized is given the opportunity to earn a brokerage commission by successfully procuring such a prospect. Listing agreements of real estate brokers generally follow one of three basic forms: *open listing, exclusive agency,* or *exclusive right to sell.* In an *open listing,* the broker is given the opportunity to find a purchaser, but the owner (employer) retains the right to sell his property himself, either directly or through another broker. Under an open listing, a broker earns a commission only if he proves that he was actually the procuring cause of the transaction; *i.e.*, that the sale was a result of brokerage services personally performed by him.

An *exclusive agency* listing is one in which the property owner employs only one broker, exclusively. Should another *broker* be the procuring cause of the transaction, the one possessing the exclusive agency is also entitled to collect a commission, regardless of whether or not he actually was the procuring cause of the transaction. Such a broker would be entitled to compensation, except in the case of a sale made directly through the owner himself.

An *exclusive right to sell* employs one broker to the exclusion of all others, including the owner himself. In all cases in which the broker's listing is an exclusive right to sell, the broker earns a commission whether or not his efforts actually contributed to the sale. In such cases, the broker is "deemed" to be the procuring cause of any transaction that takes place.

The basic difference between the various types of listing agreements is the degree of protection afforded a broker when the transaction is consummated through the efforts of someone other

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tract did exist under which the broker had not performed sufficiently to entitle him to a commission). *Gauquin, Inc. v. Spring,* however, was a case of "hard facts." The broker had served for 39 months supervising improvements being made on a tract of land belonging to the principal in order to sub-divide the property, with expectations of being remunerated through earning commissions on each of the sub-divided lots as they were sold. As a result of a heart attack, the broker was unable to complete his service, although the work of sub-dividing the property was 80-90% complete. Despite the fact that the broker had not even begun to procure purchasers for the lots, the court awarded $19,000.00 in quantum meruit "for valuable services rendered," under the rationale that "it cannot fairly and reasonably be said that plaintiff wasn't to receive some remuneration." *See also* Sugar Field Oil Co., Inc. v. Carter, 214 La. 586, 38 So. 2d 249 (1948) (the court granted quantum meruit in a sum equivalent to 5% of the consideration paid to the principal for an option privilege which was never exercised, where the option payments alone totalled $75,000.00).

than the broker himself during the primary term[13] of the agreement.[14]

An *open listing*, being non-exclusive in nature, provides the least protection for a broker, since an open listing allows him a commission only if he can prove that his efforts (or the services of someone acting on his behalf) resulted in achieving the principal's objective, *i.e.*, the sale of the property. In an open listing[15] the broker *always* must prove that he was the procuring cause of the transaction.

An *exclusive agency listing*[16] protects the broker's right to a commission if a sale is made through some other broker within the primary term of the brokerage contract, but denies recovery of a commission if a sale is consummated directly through the principal himself independently of any broker. Thus, in claiming a commission due as a result of the sale of the principal's property under an exclusive agency listing, a broker must prove that his efforts were the procuring cause of a sale only if the principal has concluded the sale directly or if the sale was consummated after the expiration of the primary term of the brokerage contract.[17] Under an exclusive agency listing, if the sale was completed through anyone other than the principal and within the primary term of the listing agreement, the broker is *deemed* to be the procuring cause of the sale.

An *exclusive right to sell*, which is also known as an exclusive listing, furnishes the greatest possible protection to the broker. Under an exclusive listing, a broker is deemed to be the procuring

13. "Primary term" refers to the stipulated term agreed to by the principal and the broker, after which the brokerage contract or listing agreement will expire automatically.

14. Any ambiguity or doubt as to what type of brokerage agreement was contemplated by the parties will generally be construed against the broker who authored it. Williams v. Bel, 339 So. 2d 748 (La. 1976); Denis, Danziger & Tessier v. Tilton, 120 La. 226, 45 So. 112 (1907); Cramer v. Guercio, 331 So. 2d 550 (La. App. 1st Cir. 1976). In the absence of express contractual provisions to the contrary, it is presumed that the parties intended to execute a brokerage contract offering *less* protection to the broker, not *greater* protection. *See, e.g.*, Dickinson v. Robinson, 145 La. 438, 440, 82 So. 398, 399 (1919) (absent contract language to the contrary, a landowner, by hiring a real estate agent, does not thereby preclude himself from selling, nor is he thereby precluded from hiring other agents to sell it); Westinghouse Credit Corp. v. Cassano, 291 So. 2d 493 (La. App. 4th Cir. 1974) (an exclusive listing must be proven by unequivocal language or express negation of the owner's right to sell himself without liability for the commission; if the brokerage contract is oral, the court will determine its character as an issue of fact according to the credibility of testimony).

15. *See, e.g.*, Prescott Murphy Realty, Inc. v. Ward Peters Inv., Co., Inc., 340 So. 2d 646 (La. App. 2d Cir. 1976).

16. *See, e.g.*, O'Neal v. Southland Lumber Co., Inc., 168 La. 235, 121 So. 755 (1929).

17. Even after the expiration of a brokerage contract, the court may infer the existence of an implied extension clause. See text at note 164, *infra*.

cause of the transaction and is therefore entitled to a commission without regard to the identity of the person who was the actual procuring cause, in the event of *any* sale of the principal's property consummated before the expiration of the primary term of the brokerage contract. In such a case, it is irrelevant whether the sale took place through the efforts of another broker or whether the owner himself sold the property. In other words, under an exclusive listing, the issue of procuring cause becomes relevant *only* in cases where the sale was completed after the expiration of the primary term of the brokerage contract.[18]

Statutory Licensing Requirements

For a real estate broker to earn a commission, he must first comply with applicable Louisiana statutory requirements. Amended in 1978, the Louisiana Real Estate License Law[19] provides that it is "unlawful for any person, directly or indirectly to engage in or conduct, or to advertise or hold himself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker . . . without first obtaining a license."[20] Under today's statute an unlicensed broker has no right to recover compensation for the performance of brokerage services.[21] At common law a broker need not have a license *at the time he entered into* his contract of employment so long as he was duly licensed *at the time the brokerage services were actually rendered.*[22] In contrast, the current Louisiana licensing statute provides that any person who even *offers* to perform brokerage services or who solicits any promise to pay compensation for brokerage services without being licensed forfeits his right to sue in state courts for collection. Even in Louisiana, however, the issue of whether a broker is licensed becomes moot once his right to a commission is earned. A principal may *not* defeat a broker's claim for a commission on the ground that the broker's license was suspended *after* the broker had already earned a vested

18. For cases defining and interpreting exclusive right to sell listings and indicating the courts' general willingness to uphold and enforce such agreements, *see Trapani v. Katz*, 198 So. 2d 423 (La. App. 4th Cir. 1967), and authorities cited therein.

19. LA. R.S. 37:1431-64 (1950 & Supp. 1979).

20. LA. R.S. 37:1436 (1950 & Supp. 1978).

21. LA. R.S. 37:1445 (1950 & Supp. 1978):

> No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this Chapter . . . unless such person was duly licensed under this Chapter . . . prior to the time of offering to perform any such act or service or procuring any promise to contract for the payment of compensation for any such . . . act or service.

22. 12 C.J.S. *Brokers* § 67 (1938).

right to a commission, because, in such a case, he has the right to collect a commission as long as he was licensed at both the time the brokerage agreement was made and during the performance of his services.[23] Because of the importance of licensing, it is necessary to know what is included in the statutory and jurisprudential definitions of "broker," "real estate," and "brokerage services."

Definition of "Broker"

Revised Statutes 37:1431 provides that the definition of "real estate broker" includes:

> any person, partnership,[24] association, or corporation,[25] foreign or domestic, who for another . . . and . . . for a fee, commission or other valuable consideration, . . . (a) Sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of real estate, (b) Offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate, (c) Lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to auction, any real estate, or the improvement thereon, (d) Buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon, (e) Advertises or holds himself . . . out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, (f) Assists or directs in the procuring of prospects or the negotiations or closing of any transaction, other than mortgage financing, which results or is calculated to result in the sale, exchange, leasing, or renting of any real estate, other than a provider of information, ideas, and materials to guide homeowners in the sale of their own property, (g) Is employed by or on behalf of the owner of lots[26] . . . to sell such

23. Wendel v. Dixon Real Estate Co., Inc., 232 So. 2d 791 (La. App. 4th Cir. 1970); Wood v. Morgan Bros., 135 So. 2d 692 (La. App. 2d Cir. 1961).

24. As to whether a licensed partner in an unlicensed partnership can collect a commission, *see* Fort Orange Co. v. O'Neal, 189 So. 685 (Fla. 1939) (only if the plaintiff does not intend to share his commission with the partnership). As to whether an unlicensed partner in a licensed partnership may collect a commission, *see* Lee v. Moseley, 149 S.E. 808 (Ga. App. 2d Div. 1929) (commission denied). *But see* E. M. Glynn, Inc. v. Duplantis, 250 La. 381, 196 So. 2d 47 (1967) (as long as the close corporation was licensed, the sole shareholder need not be).

25. E. M. Glynn, Inc. v. Duplantis, 250 La. 381, 196 So. 2d 47 (1967).

26. *See* Trentman Co. v. Brown, 176 La. 854, 147 So. 14 (1933) (license required even if broker works only for *one* principal). Under the literal interpretation of R.S. 37:1431(2)(g) salaried employees of sub-dividers or other employers in the real estate business, whose services are utilized to aid the employer in the sale of real property, are now classified as "brokers" under the licensing statute.

> real estate, or any parts thereof, . . . and who sells, exchanges, offers, attempts, or agrees to negotiate the sale or exchange of any such lot . . . . (or) (h) Is engaged in the business of charging . . . a fee in connection with any contract whereby he undertakes primarily to promote the sale, exchange, purchase, rental or leasing of real estate through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both.[27]

By express legislative provision[28] the definition of "broker" does not include:

> (1) Any person who, as owner or lessor, either individually or through an employee or representative *and not otherwise engaged in the real estate business*, performs acts of ownership with reference to the property owned by him;[29] (2) an attorney at law [rendering services] on behalf of a client which may be required in the normal course of legal representation; (3) [a] receiver, trustee in bankruptcy, administrator, executor, tutor, or civil sheriff for any parish of this state; or (4) [a] trustee selling under a deed of trust . . . .

The above categories of persons, therefore, need not be licensed in order to collect a brokerage fee. Under the jurisprudence which interpreted the licensing statute before its 1978 amendment, an unlicensed person, not engaged in the real estate business,[30] securing a purchaser in one isolated instance, was not a "broker" within the definition of the act and hence was eligible to recover a commission.[31]

It is still true that, in *all* cases, a person who has even a "partial vocation" in the real estate business is required to be licensed.[32]

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27. LA. R.S. 37:1431(2) (1950 & Supp. 1979).

28. LA. R.S. 37:1438 (1950 & Supp. 1979) (emphasis added).

29. *See* Buras v. Fidelity & Deposit Co. of Maryland, 197 La. 378, 1 So. 2d 552 (1941) (commission denied to an unlicensed owner who sold his own property, when the owner was in the business of sub-dividing property).

30. The term "real estate business" is broader than the term "brokerage business" and therefore would include acts beyond those described in the statutory definition of "broker."

31. Sheppard v. Hulseberg, 171 La. 659, 131 So. 840 (1930).

32. Sellers v. Evans, 207 So. 2d 841 (La. App. 2d Cir. 1968) (commission denied because of evidence that the broker had a "partial vocation" in the real estate business, including evidence that, in addition to the broker's having sold several lots of his own, he previously had investigated the possibility of selling, to an earlier prospect with the intent to collect a fee, the same property for which he was currently claiming a fee). *See* Maniscalco v. Glass, 163 So. 2d 438 (La. App. 2d Cir. 1964) (it is no defense that one engages in a non-real estate occupation simultaneously and concurrently with engagement in the real estate business).

However, in 1978, the Louisiana Real Estate License Law was extensively amended and now provides that "[t]he commission of [even] a single such [brokerage] act by a person required to be licensed . . . and not so licensed shall constitute a violation . . . ."[33] Thus, there is no longer a valid "isolated transaction exception" except insofar as an unlicensed person, "not otherwise engaged in the real estate business, performs acts of ownership with reference to property owned by him . . . ."[34] When a broker deals with real estate owned by a third party, the "isolated transaction" exception to the licensure requirement no longer is available.

Definition of "Real Estate"

One who performs brokerage services must be licensed *only* if the transaction is one dealing with a sale, exchange, purchase, rental, lease, auction, offer, listing, option, advertisement, or promotion of "real estate." The applicable statute includes in its definition of real estate "condominiums and leaseholds, as well as any other interest in land."[35] Therefore, presumably the sale of a condominium or a (preexisting) leasehold interest by a broker would require a license under the statute.[36] The statute also provides that the definition of "real estate" includes real estate situated in this state or elsewhere.[37] The statutory definition of real estate expressly *excludes* oil, gas, and other minerals, and, therefore, no license is required of agents who sell or negotiate mineral leases.[38] Likewise, a Louisiana court has held that the licensing statute is not applicable to contracts to extract gravel or to the negotiation of gravel leases.[39] Although Louisiana courts at one time held that no license was required for negotiating transactions dealing with timber estates,[40] nevertheless the current jurisprudence includes timber within the

33. LA. R.S. 37:1436 (1950 & Supp. 1978).

34. LA. R.S. 37:1438(1) (1950 & Supp. 1979).

35. LA. R.S. 37:1431(5) (1950 & Supp. 1979).

36. In *Stanford v. Bischoff*, 159 La. 892, 106 So. 371 (1925) (apparently statutorily overruled by R.S. 37:1431(5)), the court, on rehearing, held that the statute was inapplicable to the sale or purchase or pre-existing real estate leases, as opposed to the original negotiation of such leases.

37. LA. R.S. 37:1431(5) (1950 & Supp. 1979). *See* Moore v. Burdine, 174 So. 279 (La. App. Orl. Cir. 1937) (A broker negotiated the sale of real estate located in Mississippi. The contract to buy was executed in Mississippi, but the prospects were domiciled in Louisiana. The court therefore held that the broker must comply with the Louisiana License Law; therefore, since the broker was not licensed as a Louisiana broker, his claim for commission was denied).

38. Vander Sluys v. Finfrock, 158 La. 175, 103 So. 730 (1925).

39. Gonzales v. Watson, 162 La. 1048, 111 So. 416 (1927).

40. Cleaton v. Dowling, 164 La. 46, 113 So. 759 (1927).

definition of real estate and thus requires timber brokers to be licensed.[41] The licensing requirement has been held inapplicable to brokerage services relating to construction contracts;[42] however, there is a sharp distinction between a true *building contract, i.e.*, a construction or improvement made upon land belonging to another, and a *contract of sale* of real estate and improvements owned by a building contractor. A claim by an unlicensed person for compensation will be denied in the latter case, regardless of whether the claim is disguised as an "incentive payment,"[43] salary due,[44] or other denomination.

The Louisiana appellate courts have never been faced with the issue of whether the sale of a cemetery plot is the sale of "real estate," thus requiring a license. Although some jurisdictions have required licensure,[45] it is submitted that the Louisiana Real Estate License Law probably does not apply to the sale of cemetery plots. This view seems warranted because the state legislature has passed special legislation regulating the sale of cemetery plots.[46] Therefore, under traditional rules of legislative interpretation, these particularized provisions would supersede the broader legislation on real estate in general.

In common law jurisdictions, whether the sale of a business whose assets include real estate constitutes the sale of "real estate" so as to require that the negotiating agent(s) be licensed may depend upon whether the sale of real estate is only "incidental" to the sale of the business[47] or upon whether the sale of real estate is divisible from the sale of the business as a whole.[48] No Louisiana appellate court has yet addressed this issue, but presumably the

41. Ranger Land Co., Inc. v. Aetna Cas. & Sur. Co., 224 La. 153, 68 So. 2d 907 (1953).

42. Upton v. McDowell, 307 So. 2d 146 (La. App. 1st Cir. 1974).

43. Parr v. Asaff, 322 So. 2d 313 (La. App. 2d Cir. 1975) (commission denied to a non-licensed employee of a building contractor who has located purchasers for the sale of speculation homes which had been built by the contractor; the court drew an analogy between the "incentive" payments, allegedly due to the employee, and commissions earned by brokers who perform similar services).

44. Under the literal language of R.S. 37:1431(2)(g) anyone who "[i]s employed by . . . [an] owner of lots . . . at a stated salary . . . who sells . . . such lot[s]" is a broker within the statutory definition of that term.

45. *See, e.g.*, Sockel v. Degel Yehudo Cemetery Corp., 268 App. Div. 207, 49 N.Y.S.2d 176 (1944).

46. *See* LA. R.S. 8:1-903 (1950 & Supp. 1974).

47. Schindler v. Florida Real Estate Comm'n, 144 So. 2d 862 (Fla. App. 3d Dist. 1962) (no license is required for the sale of a business as long as the sale of real estate is only incidental to the sale of the business).

48. *See, e.g.*, Moreland v. Kilgore, 83 Ga. App. 606, 64 S.E.2d 295 (1951) (divisible).

owner of a non-real estate business would be exempted from the licensure requirement under Louisiana Revised Statutes 37:1438(1).[49]

Definition of "Brokerage Services"

The courts' interpretation of a brokerage service which would require a license does not include services rendered *to* a broker. Although only a licensed broker can sue for a commission from the principal,[50] nevertheless, no license is required for an unlicensed employee of the broker to collect a fee *from the broker* for his aid *to the broker*.[51] Similarly, a commission-splitting agreement is not within the purview of the licensing requirement, and, therefore, one need not be licensed in order to share a commission with a licensed broker.[52] No Louisiana appellate decision has yet addressed the issue of whether a joint venture agreement for the acquisition, development, and sale of land would be included within the category of "brokerage" services, thus requiring licensure.[53]

Statutory and Jurisprudential Prerequisite of an Employment Contract

Statutory Requirement

The Louisiana Real Estate License Law provides statutory authority for the suspension or revocation of a broker's license if a broker offers real estate for sale or lease without the knowledge and consent of the owner or his authorized agent or if a broker places a sign on any property offering it for sale or rent without the written consent of the owner or his authorized agent.[54] Suspension of a broker's license *after* he has already earned a vested right to a commission is not, however, a valid defense in an action for the earned commission.[55] These statutory mandates, standing alone, require the

49. See text at note 28, *supra*.

50. LA. R.S. 37:1445 & 1446 (1950 & Supp. 1978). *See* Walker v. Meyer, 167 La. 218, 119 So. 26 (1928); Bristol v. Koral, 295 So. 2d 520 (La. App. 1st Cir. 1974). *But see* Bennett v. Bobby J. Gauthier Contractor, Inc., 242 So. 2d 595 (La. App. 1st Cir. 1970).

51. Kalmbach v. Becker, 1 La. App. 91 (2d Cir. 1925); Bosetta v. Jacobs, 1 La. App. 277 (Orl. Cir. 1924).

52. Moore v. Henderson, 124 So. 702 (La. App. Orl. Cir. 1929) (commission-splitting agreement took the form of a promise by the broker to rebate to the owner a portion of the commission earned by the broker).

53. *See generally* Annot. *Joint Adventure Agreement for Acquisition, Development, or Sale of Land as Within Provision of Statute of Frauds Governing Broker's Agreement for Commission on Real Estate Sale*, 48 A.L.R.2d 1042 (1956) (such endeavors are generally held *not* to fall within the purview of the brokerage statutes).

54. LA. R.S. 37:1455(A)(10) & (11) (1950 & Supp. 1979).

55. Wendel v. Dixon Real Estate Co., 232 So. 2d 791 (La. App. 4th Cir. 1970); Wood v. Morgan Bros., 135 So. 2d 692 (La. App. 2d Cir. 1961).

existence of at least an implied brokerage agreement between the principal and the broker; but these provisions provide only prospective sanctions for noncompliance, *i.e.*, forfeiture of license privileges with a corresponding inability to earn *future* commissions. The statutory mandates have no regulatory effect on commissions which already have been earned.

Jurisprudential Requirement

Louisiana has long had a jurisprudential rule denying the right to recover any compensation for brokerage services—whether past or future—unless they were performed under a brokerage or listing contract.[56]

Validity and Formalities

At common law, a brokerage agreement was not required to be in writing, unless performance was not to take place within one year or unless the broker was to be compensated by a transfer of an interest in real property.[57] In contrast, a number of jurisdictions statutorily require that all brokerage or listing agreements be in writing;[58] Louisiana has no such legislative requirement. In Louisiana, brokerage contracts may be oral or written[59] and, if written,

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56. *See* Bender v. International Paint Co., 237 La. 569, 111 So. 2d 775 (1959); Boykin v. Louisiana Petroleum Corp., 172 La. 574, 134 So. 749 (1931) (burden is on plaintiff-broker to prove that a brokerage contract existed); Westinghouse Credit Corp. v. Cassano, 291 So. 2d 493 (La. App. 4th Cir. 1974); Johness Realty Co. v. Farm Indus., Inc., 160 So. 2d 350 (La. App. 4th Cir. 1964); Lowenthal v. Stansell, 135 So. 2d 72 (La. App. 2d Cir. 1961); Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935) ("It is settled law that before a legal charge can be made, there must be a contract of employment, either expressly made or logically implied from the facts," *quoting* Jones & Co. v. Itzkovitch, 9 Orl. App. 168, 169-70 (La. App. 1912)).

57. 12 C.J.S. *Brokers* § 62 (1938).

58. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 44-101 (1967):

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto . . . lawfully authorized: . . . (7) Upon an agreement . . . authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission.

See also CAL. [CIV.] CODE § 1624 (1973) ("The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: . . . (5) An agreement . . . authorizing or employing an agent, broker, or any other person to purchase or sell real estate . . . .").

59. Olympic Homes, Inc. v. Ory, 207 So. 2d 258 (La. App. 1st Cir. 1968); Veters v. Krushevski, 100 So. 2d 93 (La. App. Orl. Cir. 1958); Isaac v. Dronet, 31 So. 2d 299 (La. App. 1st Cir. 1947); Lally v. Dossat, 31 So. 2d 41 (La. App. Orl. Cir. 1947). *See* Whatley v. McMillan, 152 La. 978, 94 So. 905 (1922). *Whatley* restated the well-established rule that a mandate to sell immovable property must be given in writing. The court, how-

may be orally modified[60] or extended.[61] Even if a brokerage agreement or a promise to pay a commission has been executed in writing, the broker himself need not be a signatory to the contract,[62] nor must a written brokerage agreement describe the listed property as fully as would be required in a contract of sale.[63] In no respect must a brokerage contract, if written, be very detailed,[64] and it need not state the precise rate of commission to be paid to the broker upon performance.[65]

In Louisiana, brokerage contracts are characterized as employment contracts, with the result that the only applicable statutory proof requirements for such agreements are those mandated by Louisiana Civil Code article 2277,[66] *i.e.*, they may be proved by *any* competent evidence or, as in the usual case wherein the brokerage fee exceeds $500, they must be proved by at least one credible witness and other corroborating circumstances.[67] The plaintiff himself may qualify as the "one credible witness,"[68] and the cor-

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ever, then distinguished a brokerage agreement from a mandate to sell and concluded that a brokerage agreement is merely an employment contract which hires a broker to procure a purchaser, with whom the principal himself will conclude the sale. Therefore, since the brokerage contract does not give the broker the power actually to execute the purchase agreement or the sale contract, the brokerage contract has no direct effect on the property and therefore need not be in writing.

60. Robert J. Naquin & Assoc., Inc. v. Portage Plantation, Inc., 372 So. 2d 821 (La. App. 3d Cir. 1979); Young v. Smith, 366 So. 2d 982 (La. App. 1st Cir. 1978); Strahan v. Weiland, 216 So. 2d 169 (La. App. 1st Cir. 1968).

61. Foulks v. Richardson, 87 So. 2d 335 (La. App. 1st Cir. 1956) (verbal extension of primary term of brokerage contract is valid).

62. Wolfe v. Anderson, 242 So. 2d 14 (La. App. 3d Cir. 1970); Lally v. Dossat, 31 So. 2d 41 (La. App. Orl. Cir. 1947) (broker need not sign the written contract, citing Civil Code articles 1811, 1818, and 2745); Duncan Steele, Inc. v. Labatt, 130 So. 841 (La. App. Orl. Cir. 1930) (broker need not be a party to the contract, citing Civil Code article 2988).

63. Olympic Homes, Inc. v. Ory, 207 So. 2d 258 (La. App. 1st Cir. 1968).

64. Donlon v. Babin, 44 So. 2d 134 (La. App. 1st Cir. 1950). The *Donlon* contract language stated that broker was to get "5% on gross amount of any 'deal' . . . bearing on said property . . . ." *Id.* at 135. The court held that this language was not so unclear as to preclude enforcement. "Deal" was interpreted by the court to include: a contract to sell, an exchange contract, *etc.*, but not such contracts as mortgages. The court in this case granted recovery of the commission when, after a sale by all co-owners to the Building and Loan Association, the property had been recovered by one of the co-owners.

65. Lally v. Dossat, 31 So. 2d 41 (La. App. Orl. Cir. 1947) (stipulated commission rate of "4-5%" not so indefinite as to preclude enforcement. The court therefore enforced the contract according to the customary and prevailing rate of commission among real estate agents).

66. LA. CIV. CODE art. 2277.

67. Dickerson v. Hughes, 370 So. 2d 1301 (La. App. 3d Cir. 1979).

68. Samuels v. Firestone Tire & Rubber Co., 342 So. 2d 661 (La. 1977).

roboration requirement exists only for general corroboration and not as to details.[69]

Implied Brokerage Contracts

Just as a brokerage agreement need not be in writing, it also need not be *express*.[70] Implied contracts frequently are found on the basis of the conduct or actions of the broker and the alleged principal or on the basis of the principal's knowing acceptance of the broker's volunteered services.[71] A knowing acceptance or encouragement of the broker's successful efforts is held to constitute an obligation to pay a standard brokerage commission.[72] In order for the court to find that an implied brokerage contract existed, the plaintiff-broker must prove that there was an offer of brokerage services, acceptance of the offer or knowing consent to the performance of the services, and knowledge on the part of the alleged principal that the services were being rendered by the broker with an expectation of payment of a commission from the defendant.[73]

In analyzing the various sets of factual circumstances in which courts have found that an implied brokerage contract either *did* or *did not* exist, it becomes evident that the operative factors which *favor* a finding that an implied agreement existed include: (1) actual, imputed, or constructive knowledge or reason to believe on the part of the alleged principal that a broker is performing brokerage services and expects to be compensated for his services and that (in cases where the alleged principal is the owner of the subject property) it is customary for the broker to look to the principal for payment;[74] (2) active or affirmative conduct, acts, or statements (including direct requests) on the part of an owner of property which

69. *Id.*

70. Doll v. Fireman's Charitable and Benevolent Ass'n, 8 So. 2d 156 (La. App. Orl. Cir. 1942); Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935).

71. *See* Rolston v. Buff, 130 So. 2d 732 (La. App. 1st Cir. 1961).

72. *See* Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935).

73. Harvey v. Winters, 1 La. App. 383 (Orl. Cir. 1925).

74. Adams v. Spillman, 290 So. 2d 726 (La. App. 1st Cir. 1974); Olympic Homes, Inc. v. Ory, 207 So. 2d 258 (La. App. 1st Cir. 1968). *See* Craton v. Miller, 47 So. 342 (La. App. 2d Cir. 1950) (it is customary for the seller to pay brokerage fees unless there is a specific agreement to the contrary); Mobley-Rosenthal, Inc. v. Weiss, 152 So. 589 (La. App. 2d Cir. 1934) (it is no defense that the alleged principal—owner of the property—supposedly did not know that the plaintiff was a broker when it was generally known in the community that he was; also it is no defense that the owner erroneously thought that the broker was acting gratuitously). *See also* 12 C.J.S. *Brokers* § 61(b) (1938): "A sufficient . . . contractual basis for a right to compensation exists where the owner of property lists it with a broker, or places it in his hands, for sale . . . and a sale is made through his efforts."

would acknowledge or encourage a broker to perform services on behalf of the owner;[75] (3) actual knowledge or notice of such services, coupled with silence or inaction;[76] (4) the existence of past conduct or previous similar brokerage agreements between plaintiff and defendant which would tend to indicate that a current brokerage agreement exists;[77] (5) the extent and value of the services rendered by the broker and the correlative benefit accepted by an owner of property which would make it inequitable for the owner to deny that a brokerage contract existed;[78] (6) a finding by the court that the principal subsequently ratified acts of the broker done without authority or in excess of his authority.[79]

On the other hand, the operative factors which militate *against* finding that a brokerage contract existed between the plaintiff and the defendant include: (1) lack of any *express* assumption of liability

75. Dickerson v. Hughes, 370 So. 2d 1301, 1303 (La. App. 3d Cir. 1979) ("[I]f you see a good prospect, send him down"); Perkins & Sons v. Laborde, 271 So. 2d 658 (La. App. 1st Cir. 1972) (implied continuation of the brokerage contract where the owner sent the broker a map and prospectus of the property); Craton v. Inabnett, 62 So. 2d 129 (La. App. 2d Cir. 1952) (defendant requested broker's services); Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935) (no commission unless the broker's services were rendered pursuant to the express or implied request of his principal. The court indicated that while a contract of employment may be implied from subsequent acts of ratification on the part of the alleged principal, in order to warrant the inference of a previous request, the owner must say or do something tending to prove that he accepted the broker as his agent, more than merely selling to the agent's prospect).

76. A. K. Roy, Inc. v. Roy, 380 So. 2d 689 (La. App. 4th Cir. 1980) (knowledge that the broker was performing services with the expectation of compensation coupled with silence and inaction on the part of the property owner); Harvey v. Winters, 1 La. App. 383 (Orl. Cir. 1925) (acceptance of the broker's services constitute an implied brokerage contract).

77. George E. Newell & Son v. Hensarling, 148 So. 2d 480 (La. App. 4th Cir. 1963) (the last two counter-offers had both contained provisions for a commission; therefore, the court inferred one in the current offer); Craton v. Inabnett, 62 So. 2d 129 (La. App. 2d Cir. 1952) (defendant had paid plaintiff a commission in the past for similar (loan brokerage) services, so the court inferred an intent to do so for the current services).

78. Kernaghan & Cordill v. Uthoff, 180 La. 791, 157 So. 595 (1934) (broker's services greatly enhanced the value of defendant-owner's property. In contemplation of commissions on future sales, broker had originated the idea of combining several unvaluable pieces of property to create a sub-division. The owner accepted the broker's services while refusing to agree to give him a listing agreement. Commission granted); A. K. Roy, Inc. v. Roy, 380 So. 2d 689 (La. App. 4th Cir. 1980) (plaintiff-broker was to clear, fill, and sub-divide defendant's property in order to get 15% on sales. Owner knew that the broker was performing such services and remained silent); Gauguin, Inc. v. Spring, 316 So. 2d 858 (La. App. 1st Cir. 1975).

79. The elements of ratification consist of actual knowledge of the performance of the unauthorized act coupled with some voluntary act or declaration on the part of the principal indicating acceptance of the broker as his agent. *See* Veters v. Krushevski, 100 So. 2d 93 (La. App. Orl. Cir. 1958).

for the commission on the part of an alleged principal who is a *purchaser* or *lessee*, who could assume, according to the business custom, that the property owner (*i.e.*, the *seller* or *lessor*) would be responsible for payment of the expected compensation;[80] (2) lack of *any* communication or conversation between the broker and the alleged principal;[81] (3) express refusal on the part of the alleged principal to assume responsibility for the broker's commission in the absence either of other acts of the owner which may be construed as employment, or of the execution of a conditional brokerage contract conditioned on the broker's obtaining a purchaser who will assume responsibility for the commission.[82]

Miscellaneous Requirements

Under the Louisiana jurisprudence, in order for a broker to have a legally enforceable right to compensation, not only must a valid brokerage agreement *exist* between the broker and the principal, but the contract must have been made with reference to the specific transaction under which the broker now claims a commission.[83] In

80. Franzella Realty, Inc. v. Kolb, 152 So. 2d 837 (La. App. 4th Cir. 1963) (absent an express assumption of responsibility for payment of the commission, a lessee is not held liable for a commission, despite the fact that the lessee allowed the broker to introduce the lessee to the property which ultimately was leased directly through the owner). *See* Bender v. International Paint Co., 237 La. 569, 111 So. 2d 775 (1959) (broker was denied recovery because, although he had located warehouse facilities for the defendant, he had done so without any agreement for commission from the defendant).

81. *See, e.g.*, Bender v. International Paint Co., 237 La. 569, 111 So. 2d 775 (1959) (broker admitted that he had not discussed commission with either the lessor or the lessee); Latter & Blum v. Metropolitan Life Ins. Co., 208 La. 490, 23 So. 2d 193 (1945) (the court found that the broker was merely trying to "get a margin" between the best offer of vendor and vendee. The broker had misrepresented the offer that had been made; broker told vendor only what the vendor would *net* and not that the sale price included an additional sum that the broker intended to keep as his commission); Teague v. Ashy, 278 So. 2d 516 (La. App. 3d Cir. 1973) (no discussion of commission between the broker and the alleged principal; commission denied).

82. Monsur v. Hoornstra, 95 So. 2d 656 (La. App. 2d Cir. 1957) (the mere fact that the commission is included as part of the sale price does not establish conclusively the vendor's liability for the brokerage commission; where the vendor specifically stipulates that there is no brokerage agreement unless the purchaser assumes liability for the commission, then the mere fact that the vendor allows the commission to be included as part of the purchase price does not render the vendor liable for the commission if the sale is not consummated); A. Gagliano, Inc. v. Barba, 24 So. 2d 825 (La. App. Orl. Cir. 1946).

83. Doll v. Albert Weiblen Marble & Granite Co., 207 La. 769, 22 So. 2d 59 (1945) (the broker must have been employed to negotiate the very contract in connection with which he rendered his services); George E. Newell & Son v. Terrytown New Orleans Corp., 193 So. 2d 389 (La. App. 4th Cir. 1966) (commission denied because,

addition, the jurisprudence requires that the principal execute the brokerage contract with a licensed *broker*, as opposed to a *salesman* or *associate broker* who is affiliated with and sponsored by another broker.[84]

Heritability of Brokerage Contracts

Once a licensed broker has made a valid brokerage or listing contract with a principal, the contract is binding on the heirs and successors of the principal; because the brokerage agreement is an employment contract, the obligation is heritable on the part of the *obligee*.[85] However, because employment contracts are *not* heritable on the part of the *obligor*,[86] the ordinary rule would be that the broker's listing is *not* heritable, and thus the broker's authority would not extend to his heirs or legatees. The real estate license statute, as amended in 1978,[87] apparently attempts to alter this rule. Revised Statutes 37:1451 provides:

> Whenever a real estate broker dies, any duly licensed member of the business, corporation, firm, association, or other organiza-

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although a brokerage contract did exist with reference to other portions of the property belonging to the alleged principal, the court found that no brokerage agreement existed with reference to the defendant's west tract).

84. LA. R.S. 37:1446 (1950 & Supp. 1978) provides that "[a]ssociate brokers or salesmen shall not accept a commission or valuable consideration for the performance of any act herein specified from any person, except their sponsoring broker." *See* Walker v. Meyer, 167 La. 218, 119 So. 26 (1928) (brokerage contract must be made with a broker or a salesman representing a disclosed broker. It is not sufficient if a contract is made with a salesman only or with a salesman representing an undisclosed broker. Salesmen cannot enforce legally their own demands for commissions, nor can they transfer their (non-existent) right to a broker for enforcement).

85. LA. CIV. CODE art. 2007. *See* Richardson v. Bradford, 153 La. 725, 727, 96 So. 546, 547 (1923) (although denying recovery of the commission because the broker never succeeded in procuring a ready, willing, and able buyer on terms agreeable to the seller, the court, citing Civil Code article 2745, said:

> [W]e cannot agree that a [brokerage] contract . . . is governed by the law of mandate as laid down in articles 3016 *et. seq.* of the Revised Civil Code . . . . The plaintiff was given the exclusive right, for a period of one year, to offer real property for sale at a fixed price of so much per acre. If the owner had lived, he could not have revoked it during that time, after it had been accepted and the plaintiff had commenced bona fide efforts to sell the property. Having died within the year, his heirs were bound to perform, if the plaintiff found a purchaser able and willing to buy under the terms of the agreement; . . . as to the obligor or owner of the property, the obligation was heritable, and did not expire with his death. It was an employment [contract] . . .).

Cf. Dunaway Realty Co., Inc. v. Pulliam, 364 So. 2d 198 (La. App. 1st Cir. 1978) (the court refused to hold the widow of the broker's deceased principal personally liable, where the widow had not assumed personal liability for the debts of the succession).

86. LA. CIV. CODE art. 2007.

87. 1978 La. Acts, No. 514, *amending* LA. R.S. 37:1431-64 (1950).

> tion or person who is associated in real estate business with the deceased broker, may, during a period of one hundred eighty days after the date of the death of the broker, complete, carry out, and enforce any contracts which the deceased broker entered into *in the name of said real estate business* and in the course of said real estate business.[88]

Although a brokerage listing remains non-heritable, the statute's purpose presumably was to give a deceased broker's professional associates, who might not otherwise have any rights under the contract, at least a limited right to perform under the deceased broker's authority. However, the statute, as written, does not appear to accomplish its intended purpose.

R.S. 37:1451 apparently is inapplicable when the deceased broker entered into the listing agreement *in his own name*, individually; the provision applies only when the deceased broker entered into the listing agreement *in the name of his firm*, corporation, association, or organization. Yet protection is necessary only in the former cases, not in the latter.

In cases wherein the deceased broker had contracted in the name of his firm or organization, the individual broker's death would not affect the contractual rights of the organization because, in such cases, the broker contracted merely in a representative capacity. The organization's contractual rights would not derive from the (now deceased) representative broker's rights; instead, the organization would itself be a party to the contract.

In fact, when a broker contracts in the name of the organization, as the statute requires, the organization ordinarily has *complete* contractual rights, and thus R.S. 37:1451 is actually a *limitation* on these rights, since it reduces, as a matter of law, the term of the listing to a maximum of 180 days from the death of the representative broker.

On the other hand, when a broker has contracted in his own name, his firm or organization is *not* a primary party to the listing contract, and, since the broker's authority is not heritable, it ceases to exist at the time of the contracting broker's death. It is in these cases that the deceased broker's firm or organization would require *statutory* protection if its right to perform were to be maintained; however, when the broker contracts in his own name, R.S. 37:1451 does not seem to apply.

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88. LA. R.S. 37:1451 (1950 & Supp. 1978) (emphasis added).

Consequences of Lack of an Employment Contract

In addition to denying recovery for commissions earned in the absence of an express or implied oral or written brokerage agreement, Louisiana courts also have consistently refused to grant recovery on a quantum meruit basis.[89] If no brokerage agreement exists, not even a broker who has successfully procured a ready, willing, and able purchaser can recover a commission.[90] This is true even if the owner has benefited from the voluntary and unsolicited services performed by the broker.[91]

Distinction Between No Agreement and an Expired or Breached Agreement

The two most probable factual situations in which the court may conclude that no brokerage contract existed between the broker and the principal are, first, where no agreement ever came into existence, or, second, where a brokerage agreement had once existed, but had been consensually modified to expire early, or had expired according to its terms, or was actively breached[92] before its contemplated expiration. Very different legal consequences flow from each of these possibilities. A broker who performs brokerage services without a brokerage or listing contract has no rights whatsoever and is not legally entitled to collect compensation, regardless of whether his services were successful or whether the property

89. Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935).

90. Shannon Real Estate, Inc. v. Toll, 223 So. 2d 693 (La. App. 4th Cir. 1969) (rule applies even in cases where the broker was the procuring cause of a successful transaction).

91. Teague v. Ashy, 278 So. 2d 516 (La. App. 3d Cir. 1973) (the benefit to the defendant is irrelevant if there is no express or implied contract); U.S. Realty Sales of Shreveport v. Rhodes, 34 So. 2d 523 (La. App. 2d Cir. 1948); Doll v. Fireman's Charitable and Benevolent Ass'n, 8 So. 2d 156 (La. App. Orl. Cir. 1942) (the broker is not entitled to a commission if his services were voluntary and unsolicited by the owner); Rosenthal v. Cangelosi, 164 So. 502 (La. App. 1st Cir. 1935) (it is settled law that before a commission is due, there must be a contract of employment either expressly made or logically implied from the facts. Benefit or value of services alone is irrelevant unless accepted or consented to with knowledge).

92. The cases are legion in which it is stated as a finding of fact that "the principal unjustifiably revoked the broker's authority" or "changed his mind." What is usually meant is that the principal has committed an anticipatory breach of the brokerage contract by assuring the broker that, regardless of the broker's performance, he (the principal) no longer intends to pay a commission. As discussed earlier, the use of agency terminology technically is improper in the real estate brokerage context, because the brokerage contract is merely an employment contract and not a true mandate. Nevertheless, the opinions of Louisiana brokerage cases often refer to such anticipatory breaches by the employer as "revocations" of the broker's "authority."

owner was benefitted by them.[93] On the other hand, a broker who began the performance of his duties under a brokerage agreement, but who completed them successfully only *after* its expiration or anticipatory breach, is entitled to a full commission if the broker's services, begun during the term of the contract, were the proximate or procuring cause of a sale or other transaction completed after the expiration or anticipatory breach of the brokerage contract.[94]

If both parties mutually consent to "terminate" the brokerage contract, this is usually treated, not as a mutual rescission, but only as an early expiration of the contract.[95] Even if the employer commits an anticipatory breach, the listing agreement is considered by the courts as having merely expired early. The significance of this treatment is that, as discussed above,[96] the broker's right to a commission may be protected if he was the procuring cause of a subsequent transaction for which his services were performed before the breach.

Louisiana courts formerly held that if the brokerage contract were executed for an express contractual term, and the principal "changed his mind" or wrongfully "revoked the broker's authority" prior to the expiration of the guaranteed term, the broker was permitted to sue the principal for damages for breach of contract, which were presumed to be a sum equivalent to the amount of the stipulated commission.[97] However, recent jurisprudence holds that even if the principal commits an anticipatory breach prior to the expiration of an express primary term, the broker's damages are not

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93. *See* cases cited at note 56, *supra.*

94. *See, e.g.*, Saturn Realty, Inc. v. Muller, 196 So. 2d 321 (La. App. 4th Cir. 1967); Womack Agencies v. Fisher, 86 So. 2d 732, 735 (La. App. 1st Cir. 1956) (commission granted despite the fact that the contract to sell and the actual sale both took place after the final expiration of the listing agreement's primary term, which had already been extended an additional month. The court said: "[T]he seller is liable to the [broker] . . . for a commission if the agent was the procuring cause and if the sale is the direct and continuous result of negotiations entered into while the contract was in force . . .).

95. Tharpe v. Tracy, 40 So. 2d 509 (La. App. 2d Cir. 1949). The *Tharpe* court interpreted a "termination" of a brokerage contract based on mutual consent of the broker and the principal, not as a rescission of the listing agreement, but as a modification of the contract thereby upholding the broker's post-contractual rights which arose out of an express extension clause. The court based its decision on the rationale that the parties probably did not truly intend to "rescind" the contract and further stated that if the parties *did* intend to truly rescind, abandon, abrogate, and annul the contract *ab initio, i.e.*, "to undo it from the beginning," then their *mutual* intent to do this must be clearly and unequivocally expressed.

96. *See* text at note 94, *supra.*

97. *See, e.g.*, Clesi v. D'Angelo, 5 La. App. 432 (Orl. Cir. 1926).

necessarily equivalent to his contractual fee, unless he can prove that, but for the principal's breach, he would have been successful in procuring a ready, willing, and able customer for the principal.[98] Of course, if the principal is in bad faith, *i.e.*, if the principal wrongfully revoked the broker's authority solely to escape the payment of commissions earned or about to be earned, the broker's right to a commission will be protected if a sale or other transaction is completed successfully.[99]

The Vesting of the Broker's Commission: The Broker's Procuration of a Ready, Willing and Able Customer

Background: The Basic Rule

It is recognized by the courts of both common law jurisdictions and Louisiana that the parties to a brokerage contract have an implied understanding that the employer intends to pay the commission out of the proceeds of the completed transaction.[100] However, this implied understanding gives rise to different consequences in the various jurisdictions. The majority of common law courts look to the point in time at which a valid and binding *purchase agreement* is executed to determine whether the broker has earned a commission, under the rationale that once an enforceable executory contract has been executed, it is of no consequence to the broker whether the principal chooses to enforce it or not.[101] On the other hand, Louisiana courts refuse to impose on the broker's employer the burden of suing for specific performance and therefore look to the time when a perfect *sale* has been completed in order to determine whether a commission has been earned.[102]

98. Stevens v. Tynes, 357 So. 2d 7 (La. App. 3d Cir. 1978).

99. Nickerson & Vennard v. Butcher, 129 So. 240 (La. App. 1st Cir. 1930).

100. *See* Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932).

101. 12 AM. JUR. 2d *Brokers* § 208 (1964):

> In the conventional type of brokerage contract, where the broker is entitled to his commission when a valid contract is entered into between his customer and principal, it has been held that the broker's right to commission cannot be defeated by the principal's decision not to enforce the contract upon default of the customer.

102. Munson v. Larguier, 218 La. 693, 50 So. 2d 808 (1951) (the principal bargained to sell his property and not for a lawsuit); Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932) (the courts interpret brokerage contracts to require voluntary performance on the part of the customer in order to avoid absurd consequences and to enforce the presumed intend of the parties); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931) (the court said that the owner, upon default of the purchaser, has the *option* either to sue for specific performance or to sue to have the contract declared forfeited); Haight and Rusha, Liquidators of Fritzpatrick-Dunn Realty Co. v. Marrero Land & Improvement Ass'n, Ltd., 21 Orl. App. 369, 371 (La. App. 1915) ("It

Essentially, at common law, the majority view is that a broker's right to a commission is earned when a licensed broker, performing services under a valid brokerage contract, proves himself to be or is *deemed* to be[103] the procuring cause of a valid and binding *contract* to sell (purchase agreement) executed between the principal and a ready, willing, and able buyer at a price and on terms conformable to those stipulated in the listing or brokerage agreement or which are otherwise accepted by the principal.[104] At common law, the critical point in time at which the court may conclude that the broker has procured a ready, willing, and able buyer (and therefore has earned a vested right to a commission) is the moment of the execution of a binding *contract to sell.*[105] Common law jurisdictions following the majority view also recognize various exceptions to the general rule, sometimes requiring greater duties and risk on the part of the broker and sometimes lessening the extent of the duties he is to perform. If, for example, under the terms of the employment contract, a broker is hired, not "to sell" the property, buy only "to find a purchaser" or to render another minor service, then a commission may vest even without the execution of a binding contract to sell.[106] On the other hand, if the terms of the employment contract expressly make the vesting of the commission contingent upon the delivery of a deed, the transfer of title, the closing of the sale, the payment of the purchase price, *etc.*, then no commission is earned until these conditions are met, regardless of the execution of a bind-

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was never for a moment contemplated that the plaintiff would earn or would be entitled to a brokerage commission unless and until an actual sale of the property should be finally consummated"). *See* Succession of Fairchild, 3 Pelt. 545 (La. App. Orl. Cir. 1920). In *Succession of Fairchild*, the court held that the principal is not liable for a commission unless the purchaser *voluntarily* performs on the transaction. The court's rationale was twofold: (1) the principal is not required to resort to legal compulsion; the court will not penalize him if he declines to sue the purchaser for specific performance; and (2) litigation is uncertain, expensive, and may be ruinous, *etc.*, so a completed sale translative of title is required and not a mere executory promise of sale (purchase agreement).

103. Under certain types of exclusive listings, the broker receives the benefit of *any* successful transaction, regardless of who was actually the procuring cause. In such cases, it can be said that the broker is *deemed to be* the procuring cause of the transaction. See text at notes 12-13, *supra.*

104. 12 AM. JUR. 2d *Brokers* §§ 204, 206 (1964).

105. *Id.* at § 194; 12 C.J.S. *Brokers* § 84 (1938):

> The right of a broker to compensation accrues on completion of negotiations and on a meeting of the minds of the principal and the customer procured by the broker; but, unless provided otherwise in the contract of employment, it is not dependent on the final consummation of the transaction or the performance of the agreement entered into between the principal and the customer.

106. 12 C.J.S. *Brokers* § 89 (1938).

ing contract to sell.[107] In cases wherein a broker would have earned a commission but for the fact that the intended transaction was not consummated, if the non-consummation is due to the fault of the principal or to his refusal or inability to perform, then the right of the broker to the commission is not defeated, and the principal is held liable for the commission,[108] whether or not the brokerage contract would otherwise require the consummation of the transaction.[109]

Louisiana courts have imposed additional implied conditions on brokerage contracts, thus increasing the service required of a real estate broker in order to earn a commission. The Louisiana rule is that, generally, a broker's commission is earned only when a licensed broker, performing services under an existing brokerage contract, proves himself to be or is deemed to be the procuring cause of a valid and binding contract of sale[110] executed between the principal and a ready, willing, and able buyer at a price and on terms conformable to those stipulated in the listing or brokerage agreement or which otherwise are accepted by the principal. In Louisiana, the critical point at which the broker has procured a ready, willing, and able buyer is *not* at the execution of a purchase agreement, but only at the moment of a binding *contract of sale.*[111]

The issue of whether a broker's right to a commission is defeated when the purchaser defaults after the execution of a final act of sale seldom has been litigated in Louisiana, most controversies having arisen over the nonperformance of executory purchase agreements.[112] It is submitted that, as a general rule, the default of a

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107. 12 AM. JUR. 2d *Brokers* § 205 (1964):

> Although generally a broker's commission is earned when a valid contract is entered into between his principal and a customer procured by him, it is recognized that under a special contract by which commissions are dependent upon some condition beyond that implied by the ordinary brokerage contract, the failure or refusal of the customer to carry out his contract may be fatal to the recovery of commissions by the broker . . . . This has been the result reached in some cases where the brokerage contract called for the payment of commissions on the completion, consummation, or closing of the transaction or sale.

108. Annot., *Right of Real Estate Broker, Employed to Effect or Consummate Sale, to Compensation Where Principal Refuses or is Unable to Complete Transaction,* 169 A.L.R. 605 (1947).

109. *See* Annot., *Real Estate Broker's Right to Commissions, Under Contract Calling for Net Price or Entitling Broker to All Above a Specified Price, where Sale is Not Completed Because of Refusal or Fault of Owner,* 144 A.L.R. 921 (1943).

110. *See* cases cited at note 102, *supra.*

111. *Id.*

112. At common law, in the exceptional cases where specific brokerage contract language makes the vesting of the commission contingent upon the consummation of the sale, the majority of jurisdictions do not require the principal to sue the defaulting

purchaser after a sale has been confected should not affect a Louisiana broker's right to a commission.[113] In such cases the broker's right to a commission should be granted regardless of whether the purchaser's default was the result of an arbitrary *refusal* to perform or of a financial or other absolute *inability* to perform.[114] Once the act of sale has been passed, the objective of the brokerage contract has been achieved, and the sale is perfect without further action.[115] After the sale is complete, the principal assumes the risks, inherent in any extension of credit, of the purchaser's continuing *willingness* and *financial ability* to pay the purchase price, unless the broker expressly has assumed these risks or unless the brokerage commission is made contingent upon the purchaser's voluntary performance of the credit portion of the sale price.[116]

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purchaser for specific performance, although if the principal does engage in a successful suit for specific performance, the benefits thereof inure to the broker as well as to the principal. 12 C.J.S. *Brokers* § 95(b) (1938). However, if the purchaser's default is due to his *refusal* to perform, as opposed to his financial inability to perform, then the jurisdictions are in conflict as to whether or not the principal has a duty to sue the defaulting purchaser for specific performance. Some jurisdictions do require the principal to sue a defaulting purchaser to enforce the contract if the defaulter is solvent, but not if the defaulter is insolvent, under the rationale that a suit for specific performance in the latter cases would be useless. *See* Annot., *Right of Real Estate Broker to Commissions Under a Contract Providing for Payment of Commissions Out of Purchase Price*, 20 A.L.R. 289 (1922).

113. This would be especially true in cases wherein the seller expressly assumed the rest of the purchaser's performance or wherein the seller alienated or assigned his right to receive credit payments under the sale, as when he sells his equity on the sale contract to a third person. *See* Maloney v. Aschaffenburg, 143 La. 509, 78 So. 761 (1917) (principal held liable for commission despite the purchaser's refusal to perform under the purchase agreement, because the principal had manifested an intention to pay the brokerage commission "in any event").

114. It is submitted that, although a broker is presumed to warrant the creditworthiness of a prospective purchaser so far as can be determined as of the moment of the sale, the broker is not presumed to warrant the continuing financial ability of the purchaser after that time, unless the broker misrepresented the prospect's financial ability to the seller or is otherwise guilty of misconduct. The precise extent to which a broker is deemed to warrant the credit-worthiness of the prospect, however, is beyond the scope of this comment. Suffice it to say that a broker, at most, warrants only, according to objectively determinable standards, that the prospect is financially "able" to perform at the time the title passes. *See generally* Annot., *Real-Estate Broker's Right to Commission As Affected by Failure or Refusal of Customer (Prospect) to Comply with Valid Contract*, 74 A.L.R.2d 437 (1960).

115. In Louisiana a sale is perfected upon agreement as to the thing and the price, regardless of performance. *See* LA. CIV. CODE art. 2439.

116. *See* Avery v. Helwick, 166 So. 507 (La. App. Orl. Cir. 1936). The plaintiff in *Avery* offered to negotiate the sale of defendant's freezer. The commission was to be "whatever sum he obtained for it in excess of $1,000.00." *Id.* Plaintiff did procure a buyer who purchased the freezer for $1400.00. The commission due was $400.00. Plaintiff received $150.00 when the sale was closed and was to receive a $50.00 commission

Variations of the Basic Rule in Louisiana

Exceptions Implied-in-Law

Like common law jurisdictions, Louisiana recognizes various exceptions to the general rule, sometimes increasing the duties required of the broker in order to earn a commission and sometimes decreasing those requirements. Like those in other states, Louisiana courts grant recovery of commissions to brokers when the principal prevents the consummation of a contract to sell or a contract of sale through his fault, refusal, or inability to perform.[117] By preventing the broker from earning his commission, the principal becomes liable for it. Commissions have also been awarded in cases wherein the principal permitted the purchaser to withdraw from the contract, *i.e.*, where the principal consented to the purchaser's default,[118] unless the broker also consented to or acquiesced in the gratuitous release of the purchaser from the contract to which he was bound.[119]

The Louisiana jurisprudence interpreting brokerage contracts also recognizes an implied extension clause, in favor of the broker, which has the effect of extending the life of the brokerage contract when the broker proves that he performed services (*e.g.*, negotia-

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out of the second, fourth, sixth, eighth, and tenth payments. However, the purchaser defaulted on the contract of sale, and the seller, without consulting the broker, foreclosed the mortgage and took back his freezer and the cancelled notes. The court granted recovery of the commission in favor of the broker because: (1) the broker had not guaranteed the buyer's financial ability; (2) the broker was not given an opportunity to protect his commission before the principal took actions which affected his rights; (3) the seller had accepted the buyer; and (4) the brokerage contract language did not make the vesting of the commission contingent upon the principal's receipt of the payments.

117. Farrier v. Guillory, 342 So. 2d 1167 (La. App. 1st Cir. 1977); Wolfe v. Anderson, 242 So. 2d 14 (La. App. 3d Cir. 1970); Castellon v. Nations, 230 So. 2d 675 (La. App. 4th Cir. 1970) (principal held liable for commission when he could not perform because of defective title).

118. *See, e.g.*, Boone v. David, 52 So. 2d 563 (La. App. 2d Cir. 1951) (principal held liable for commission despite purchaser's default when the principal voluntarily released the purchaser from his obligation).

119. *See, e.g.*, Miller v. Riley, 152 So. 2d 852 (La. App. 4th Cir. 1963) (the vendor, with the knowledge, concurrence, and assistance of the realtor, released the purchaser from the contract to sell; commission denied); Barry v. Ballard, 47 So. 2d 347 (La. App. 1st Cir. 1950). *See also* 12 C.J.S. *Brokers* § 87 (1938): "After a contract between the principal and a customer produced by the broker has been concluded, its subsequent modification or cancellation does not defeat or affect the right of the broker to a commission, *unless it is done at his request or with his consent or knowledge or acquiescence.*" (Emphasis added). The mere fact that a broker rightfully returns a deposit to a purchaser after the default of the *principal* does not defeat his claim for damages, in the amount of his commission, from the defaulting principal. Wolfe v. Anderson, 242 So. 2d 14 (La. App. 3d Cir. 1970).

tions, advertising, *etc.*) during the primary term of the listing agreement and that such services were the procuring cause of a sale completed after the expiration of the listing agreement.[120]

Consensual Variations

Although, it is generally presumed that the parties intend for the basic rules enumerated above to apply, nevertheless, the contracting parties may and frequently do enter into a listing agreement in which one or more of the basic brokerage rules have been modified in favor of either party.[121] In order to earn a commission under a brokerage contract, a broker usually must prove that his efforts were the procuring cause of the transaction under which he claims a commission. However, if the broker's employment contract expressly provides that the listing is an *exclusive agency* or *exclusive right to sell*, there are some situations in which the broker is not required to prove that his efforts were the procuring cause of the sale.[122] Furthermore, even under a listing agreement providing for an "exclusive agency," (which ordinarily would reserve to the principal the right to sell the property himself independently of the broker, without liability for payment of a commission) there may be—and frequently is—an express provision requiring the principal to "refer all prospects to the broker." Such a special "non-

120. Sleet v. Williams, 291 So. 2d 495 (La. App. 3d Cir. 1974) (even if the owner "revokes" the listing agreement, the broker still receives a commission on any subsequent sale of which he was the procuring cause); Pumilia v. Dileo, 169 So. 2d 581 (La. App. 4th Cir. 1964) (services rendered during the listing agreement were held to be the procuring cause of a lease entered into after "cancellation" of the brokerage contract, so commission was granted); Johnson v. Bisso Tow Boat Co., 1 Pelt. 76 (La. App. 1918) (a broker who procures a purchaser after the time of his employment has expired will be entitled to a commission when the owner accepts the purchaser and executes the sale). *See* Gottschalk v. Jennings, 1 La. Ann. 5 (1846). The *Gottschalk* court held that the general rule that the sale must be completed within the term of the brokerage contract applies only in cases where there is no ultimate sale but not in cases such as this where there was an eventual sale of which the broker was the procuring cause. Note that under modern brokerage contracts, this exception is frequently provided for expressly through special contractual extension clauses which define a certain period of time, after the expiration of the primary term, during which the broker is given the right to receive commissions on all sales concluded by the principal for which the broker was instrumental in interesting the purchaser or for which the broker conducted negotiations, or for which, as a result of other efforts or advertising of the broker, the broker is deemed to be the procuring cause of the sale.

121. F. C. Williams Real Estate v. Haydel, 364 So. 2d 171 (La. App. 1st Cir. 1978) (handwritten terms in contract construed against the author); Cramer v. Guercio, 331 So. 2d 550 (La. App. 1st Cir. 1976) (printed terms in contract construed against the broker); Kuhn v. Stan A. Plauche Real Estate Co., 249 La. 85, 185 So. 2d 210 (1966) (typewritten clause prevails over printed clauses).

122. See text at notes 12-13, *supra*.

interference" clause essentially transforms an "exclusive agency" listing into what is, in fact, an "exclusive right to sell" listing, whereby the principal is, himself, precluded from selling. Conversely, the protection provided by an exclusive listing may be modified by an express reservation by the principal of the right to sell to certain named prospects without liability for payment of a commission.

It should be noted that a broker is generally free to alter his rights under a brokerage contract by entering into a commission-splitting agreement with another broker[123] or by executing a multiple-listing agreement with a number of other participating brokers to share commissions.[124] Louisiana courts also have enforced special contractual provisions giving brokers a right to a commission for services rendered short of procuring a purchaser.[125] Similarly, contractual clauses in which the principal expressly assumes the risk of a purchaser's possible default under a purchase agreement have been enforced.[126]

Sufficiency of the Broker's Services: Basic Elements of a Claim for Commission

Unless the listing agreement expressly modifies or reduces the sufficiency of the required brokerage services,[127] a licensed Louisiana broker earns his right to a commission only when, by his performance of brokerage services within the primary term of an existing

123. Note that if the other broker is "adverse" to the principal, the consent of the principal must be obtained. *See* Annot., *Failure of Broker to Disclose to Principal Fee-Splitting Agreement with an Adverse Party, or An Adverse Party's Broker, as Breach of Fiduciary Duty Barring Claim for Commission*, 63 A.L.R.3d 1211 (1975).

124. *See generally* Annot., *Validity, Construction, and Effect of Real Estate Brokers' Multiple-Listing Agreement*, 45 A.L.R.3d 190 (1972).

125. *See, e.g.*, Neal v. Trahan, 153 La. 98, 95 So. 415 (1923). In *Neal v. Trahan*, the court granted the commission to a broker who was not the procuring cause of a sale of the principal's property, but who had sufficiently performed under the terms of the following brokerage contract: "If I sell my lease . . . I agree to pay you 10 per cent of the sale price for the work you have done in getting up the prospectus, map, etc." 153 La. at 98, 95 So. at 415. *See also* Monsur v. Chaddick, 274 So. 2d 499 (La. App. 3d Cir. 1973). The broker in *Monsur* was hired by a landowner to "negotiate" with the State Highway Department in anticipation of an expropriation of the principal's property. Broker was to receive 6% of the price received for the property if the price received was greater than $200,000.00. Since the broker was hired only to negotiate, the fact that the final transaction was completed through another broker was held to be immaterial. The court awarded the broker 6% of the $237,794.00 sale price.

126. *See, e.g.*, Maloney v. Aschaffenburg, 143 La. 509, 78 So. 761 (1917) (principal held liable for commission, despite the purchaser's default on a contract to sell wherein the principal manifested an intention to pay the broker a commission "in any event").

127. *See* cases cited at note 125, *supra*.

listing agreement, he is proven to be or is deemed to be the procuring cause of a valid and binding contract executed by the principal and a ready, willing, and able customer at a price and on terms conformable to the listing agreement or otherwise consented to by the principal. Generally, the vesting of an earned commission right depends upon the existence of several key elements: (1) a binding contract; (2) conformable terms; (3) a "ready," "willing," and "able" customer; (4) performance within the time limits stipulated in the listing agreement; and (5) satisfaction of the requirement that the broker be the procuring cause of the sale.

A Binding Contract

In cases wherein the principal's objective is the sale of his property, Louisiana jurisprudence usually requires that the sale of the property actually occur. Unless a final sale is consummated, no commission is earned. However, if the principal through his fault, refusal, or inability to perform, defaults on a contract to sell or on a purchase agreement, the brokerage commission is nevertheless due. In order to earn a commission under these circumstances, the contract to sell must be valid, enforceable, unconditional, noncontingent, and binding on both parties. If a binding contract never comes into existence because there is no "meeting of the minds," or if the contract procured by the broker is null because of mutual error, illegality, lack of capacity or competency on the part of either party, the presence of a purely potestative condition, *or for any other reason*, then the commission is not earned.[128] Likewise, if a contract does exist, but is merely a conditional agreement, no commission is due.[129]

128. *See, e.g.*, Office Center, Inc. v. Tanenbaum, 225 So. 2d 740 (La. App. 4th Cir. 1969) (contract to sell was declared a nullity on account of mutual error regarding the boundaries of the property; commission denied); Smith v. Blum, 143 So. 2d 419 (La. App. 4th Cir. 1962) (court implied that in order for a contract to be binding and a commission due, both parties must have full capacity and competency); Ernest A. Carrer's Sons v. Rumore, 52 So. 2d 57 (La. App. Orl. Cir. 1951) (commission denied because a valid contract never came into existence when, in light of the purchaser's desire for immediate possession of the property, the existence of an outstanding lease and the failure of the seller to strike out a "subject to existing leases" clause prevented a meeting of the minds between the parties).

129. In *Boisseau v. Vallon & Jordano, Inc.*, 174 La. 492, 141 So. 38 (1932), the court took notice of specific contractual language providing that the brokerage commission "is earned upon the acceptance of this offer," 174 La. at 498, 141 So. at 40, but refused to enforce the contract against a principal when the customer was unable to fulfill the condition upon which the contract of exchange was made contingent. The court found that such a result could not possibly have been contemplated by the parties; "No sane man would obligated himself to pay a real estate agent a commission for the bare privilege of listing his property for sale . . . ." 174 La. at 502, 141 So. at 41. Therefore, at least in the absence of positive proof that the signers knew the consequences of

The most frequent type of condition on which executory sales agreements are made contingent is one permitting the purchaser to withdraw from the contract if he is unable to secure adequate financing to make the payments.[130] In addition to financing conditions, other contingencies are frequently found in the jurisprudence, such as offers to buy which are contingent on the purchaser's sale of his former house,[131] offers to buy which are contingent on the purchaser's obtaining certain zoning permits,[132] or sale contracts which are contingent upon the clearing of the purchaser's check.[133] When a sale is executed subject to a resolutory condition, the commission is not earned until it becomes certain that the resolutory condition never will occur. Louisiana jurisprudence considers a sale with the right of redemption as a sale subject to a resolutory condition. If a sale is made subject to a right of redemption by the vendor, it will nevertheless constitute a valid basis for a commission claim *if* the redemption period has passed without an exercise of the seller's right of redemption.[134]

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signing and intended to be bound by these harsh terms, there was no common consent to such a clause. In the absence of mutual consent, no binding contract existed and hence no commission earned. *See* Rossignol v. Morgan & Jacobs, Inc., 191 La. 462, 185 So. 883 (1939) (contract was conditioned on the purchaser's obtaining a permit to operate a cleaning business on the premises. The purchaser was unable to obtain the necessary permit to do this, and, since the condition remained unfulfilled, no binding contract came into existence; thus no commission was earned).

130. *See, e.g.*, Becker v. Johnson, 350 So. 2d 1259 (La. App. 4th Cir. 1977); Boudreaux v. EliteHomes Inc., 259 So. 2d 669 (La. App. 4th Cir. 1972); Freedman v. Faia, 176 So. 2d 213 (La. App. 4th Cir. 1965); Treadway v. Piazza, 156 So. 2d 328 (La. App. 4th Cir. 1963); Harvery v. Riedlinger, 17 So. 2d 60, 60 (La. App. Orl. Cir. 1944) ("[I]t is now well-settled that such a condition is not (purely) potestative but merely suspensive"). *See also* Robito v. Probst, 125 So. 2d 616 (La. App. 4th Cir. 1961). Usually, the offer to purchase is made subject to the purchaser's obtaining a homestead loan of a designated type and value. The purchaser has until the expiration of the purchase agreement to secure the loan or remove the condition.

131. *See, e.g.*, Boudreaux v. EliteHomes Inc., 259 So. 2d 669 (La. App. 4th Cir. 1972) .

132. *See, e.g.*, Rossignol v. Morgan & Jacobs, Inc. 191 La. 462, 185 So. 883 (1939).

133. *See, e.g.*, Graves v. Pelican Downs, Inc., 292 So. 2d 297 (La. App. 1st Cir. 1974). Although a seemingly binding contract of sale was signed in *Graves*, the parties had a mutual understanding that the contract was not to go into effect until the purchaser's checks had cleared the bank (which they never did). The court found that, since the vendor's consent to the sale contract was conditional, the contract was never binding; no commission was earned.

134. In *Sealy Realty Co. v. Brangato*, 255 La. 898, 233 So. 2d 557 (1970), the supreme court reversed the appellate decision, Sealy Realty Co. v. Brangato, 222 So. 2d 620 (La. App. 2d Cir. 1969), which had held that a sale with right of redemption was absolutely characterized as a pignorative contract and therefore could *never* support a claim for commission.

Just as conditional contracts are held insufficient to warrant recovery of a commission, neither are earnest money contracts[135] a sufficient basis for a claim for commission.[136] Similarly, a broker does not usually earn a commission by procuring a mere option to buy which is never exercised.[137] However, the Louisiana Supreme Court on one occasion did award, on the basis of quantum meruit, five percent of the consideration paid to the principal for an unexercised option when the option payments alone totalled $75,000.[138]

Louisiana courts appear hesitant to grant a commission in cases wherein the completion of an intended sale is prevented by an unanticipated expropriation or condemnation of the subject property.[139] Such events ordinarily frustrate the purpose of the brokerage employment, for the property is no longer saleable, having been effectively removed from commerce by an uninvited and unpreventable act of the state.[140] Of course, recovery of a commission will be

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135. LA. CIV. CODE art. 2463: "But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit: he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."

136. Southport Mill v. Freidrichs, 171 La. 786, 132 So. 346 (1931); Jordy v. Salmen, Brick & Lumber Co., 121 La. 457, 46 So. 572 (1908).

137. *Gaspard v. Siggio*, 313 So. 2d 380 (La. App. 3d Cir. 1975), pointed out that whether a given contract is properly characterized as a mere option or a binding contract is a question of law to be decided by the court. *See also* McWilliams v. Soule, 6 Pelt. 76 (La. App. 1923) (commission denied when the option expires without being exercised, even though the owner subsequently sold the property to the former optionee. The court held that the expiration of the option was evidence of failure and abandonment of the negotiations and that the subsequent sale was not related to the earlier option, there being no continuity between the negotiations leading to the option and the negotiations leading to the sale).

138. Sugar Field Oil Co. v. Carter, 214 La. 586, 38 So. 2d 249 (1948).

139. *See* Lambert v. Brucker, 330 So. 2d 640 (La. App. 4th Cir. 1976) (dicta that an appropriation by the State does not constitute "a sale," and, therefore, no commission is due). Even assuming *arguendo* that the State proceedings *do* constitute a "sale" of the property, it is questionable whether the broker could be said to be the procuring cause of the transaction. *See also* 12 AM. JUR. 2d *Brokers* § 212 (1964) where it is noted that courts generally refuse to grant commissions for condemnations of property, especially in circumstances wherein the land taken varies in price or acreage from the listing agreement terms, or wherein the condemnation takes place during the sale negotiations, or wherein the condemnation award is less than the listed price. *But see* Ellermann v. Matthew, 165 So. 2d 850 (La. App. 4th Cir. 1964) (principal's land was expropriated by the State for highway purposes, and the court held that the broker should receive a commission on the $16,000.00 received, regardless of whether the transaction was a sale or an expropriation).

140. *See* Lambert v. Brucker, 330 So. 2d 640 (La. App. 4th Cir. 1976). In *Lambert*, the broker conceded that no commission was due on the appropriated property, but sued for a commission allegedly due on the sale of the rest of the principal's property to the State Board of Levee Commissioners. The court denied recovery of a commis-

granted when the broker is hired for the specific purpose of negotiating with the state on behalf of the principal.[141]

The Concept of the "Ready," "Willing," and "Able" Buyer

The phrase "ready, willing, and able" is a commonplace expression found in brokerage cases. This expression has been given the following interpretations: "Ready" refers to a posture of *present* preparedness on the part of the customer to execute the transaction; "willing" refers to the purchaser's *continuing* desire to bind himself in a contract on terms prescribed by the owner; "able" refers primarily to the voluntary financial ability of the customer to perform his obligations under the contract. "Ability" is the quality which most concerns the courts. Being financially "able" includes not only the ability to make the initial down payment on the contract, but the apparent ability to complete all credit payments as well.[142] Applying the above standards, courts have held that prospects whose financial "ability" to purchase depends upon the gratuities of third persons who are not *legally* bound to furnish funds are not "able" under the jurisprudential interpretation of that phrase.[143] It has also been held that financial "ability" does not refer to the ability of the prospect to respond in damages for nonperformance; however, a prospect *is* financially "able" if he is capable of legally borrowing the cash to make the necessary payments.[144] The term "able" has been applied not only to the financial ability of the prospect, but also to the lack of *any* other impediment which prevents the customer's performance.[145]

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sion on the sale of the unappropriated remainder of the principal's property, holding that the "emergency intervention of public authority" had made it impossible for the principal to fulfill his contractual obligation to the broker and the obligation therefore was extinguished. The broker's claims for a commission or, alternatively, quantum meruit, were both denied.

141. *See, e.g.*, Monsur v. Chaddick, 274 So. 2d 499 (La. App. 3d Cir. 1973) (after learning that his property was being expropriated, the principal had hired the broker as a safety precaution in order to avoid being "cheated" by the Highway Department).

142. Morere v. Dixon Real Estate Co., 188 So. 2d 623 (La. App. 4th Cir. 1966).

143. *See* Prescott Murphy Realty, Inc. v. Ward Peters Inc., Inv. Co., 340 So. 2d 646 (La. App. 2d Cir. 1976) (if the prospect is a corporation, then the corporate entity itself must be ready, willing, and able to perform. It is immaterial that one or more shareholders are ready, willing, and able, when the shareholders are not bound personally to purchase the property); Morere v. Dixon Real Estate Co., 188 So. 2d 623 (La. App. 4th Cir. 1966).

144. Joiner v. Lockart, 352 So. 2d 240 (La. 1977); Joiner v. Lockart, 350 So. 2d 199 (La. App. 3d Cir. 1977).

145. *See, e.g.*, Derbes v. Balche, 121 So. 366 (La. App. Orl. Cir. 1929). In *Derbes* the owner tried to sell property to himself. Since theoretically a property owner is legally incapable of selling to himself, no commission was earned.

In the absence of a consummated sale, Louisiana courts use the concept of a ready, willing, and able customer to determine whether, notwithstanding the lack of a completed sale, the broker has nevertheless earned a vested right to a commission.[146] The words "ready," "willing," and "able" are inconsistently employed in two different types of situations to describe the necessary qualifications of a prospect. In one context, the words are used in cases wherein the prospective *customer* defaults on his purchase contract to describe the requisite caliber, posture, financial standing, and capabilities of the customer which are demanded in order for a broker to earn a commission. On the other hand, the phrase "ready, willing, and able" is used to determine whether a broker has earned a commission when, upon the presentation of a prospect to the principal, the *principal* defaults or declines to accept the prospect or to execute a purchase agreement. Although the terms "ready," "willing," and "able" are purportedly interchangeable without reference to differing contexts, the courts nevertheless give these terms a different interpretation in cases wherein the *principal* has rejected a prospect whose offer conforms to the price and terms stipulated in the listing agreement than they give in cases wherein the *customer* has defaulted. Obviously, this differing treatment of an identical phrase is potentially a source of great confusion, since a prospect who is "ready, willing, and able" in one context is not necessarily "ready, willing, and able" in the other.

Typically, when it is the customer who has defaulted on an executory contract, the courts invariably *deny* recovery of a commission, under the express or implied rationale that the brokerage services were not successfully performed, *i.e.*, that the customer procured by the broker was either not "ready" or "willing" or "able" to perform.[147] In this situation, the terms are used to effectuate the general rule that the broker has no right to a commission from the *principal* if the *customer* fails to perform. Since the courts recognize the implied intent of the parties to have the commission paid from

146. *See, e.g.*, McGavock v. Woodlief, 61 U.S. 221 (1857) (broker earns a commission when he finds a ready, willing, and able buyer on terms specified by the seller). *See also* Morere v. Dixon Real Estate Co., 188 So. 2d 623 (La. App. 4th Cir. 1966) (commission denied because, although a binding contract was entered into between the principal and the prospective purchaser, the purchaser was not credit-worthy and was not financially able to carry out his obligations under the agreement); Ernest A. Carrere's Sons v. Edstrom, 119 So. 284 (La. App. Orl. Cir. 1928) (finding that the broker *had* located a ready, willing, and able customer (*i.e.*, a lessee), the court granted recovery of a commission to the broker despite the fact that, as a result of the principal's refusal to contract, not even an executory contract had been entered).

147. Munson v. Larguier, 218 La. 693, 50 So. 2d 808 (1951); Morere v. Dixon Real Estate Co., 188 So. 2d 623 (La. App. 4th Cir. 1966).

the proceeds of an executed sale, where no sale takes place because the customer defaults, this is viewed as conclusive evidence that the prospect was not "ready," "willing," and "able."

On the other hand, when a broker has procured a prospect who reasonably appears to be financially and otherwise "able" and who makes an offer (which is rejected) to the principal on terms substantially conformable to the terms of the listing agreement, the courts tend to assume that the prospect was "ready," "willing," and "able" and thus to grant recovery of the commission.[148] The apparent inconsistency in the use of these terms can be reconciled by an awareness that the courts, in the latter situation, are enforcing an implied covenant which exists in every listing agreement, in favor of a broker, that the principal will accept any "ready," "willing," and "able" prospect presented by the broker and will consummate the transaction with him.[149] The principal is relieved of responsibility for payment of the commission only if it can be shown that the prospect was not qualified. Thus, the principal should be permitted to reject a prospect if—and only if—the rejection results from the exercise of reasonable discretion on the part of the principal, culminating in a good faith, objective judgment that the prospect was not qualified.[150]

Conformable Terms

The principal's listing agreement with the broker contains an implied covenant that, in exchange for the broker's services, the principal will consummate a transaction when the broker has procured a ready, willing, and able buyer on terms and conditions satisfactory to the principal.[151] The issue that most often arises in this

148. Ernest A. Carrere's Sons v. Edstrom, 119 So. 284 (La. App. Orl. Cir. 1928). The *Edstrom* court noted that the lessor-principal declined to enter into a lease contract with a ready, willing, and able tenant-prospect procured by the broker. The court held the lessor-principal liable for the commission because "the exercise of that privilege [*i.e.*, the principal's free will to refuse to consummate the lease] was burdened with the responsibility for the compensation earned by plaintiff [broker]. . . ." *Id.* at 285. *See* Tomlinson v. Allen, 152 La. 41, 45, 92 So. 727, 729 (1922) ("the prospective purchaser can not complain, though it well may be that the agent, as a result, may be entitled to his commission").

149. Young v. Smith, 366 So. 2d 982 (La. App. 1st Cir. 1978). The *Young v. Smith* court granted the commission because, although the terms of the sale price, *etc.*, in the offer were different from those in the listing agreement, the court found that the principal had consented to a modification of the listing terms; therefore, the vendor was in default for refusing to accept a ready, willing, and able buyer on the modified terms.

150. *See* LA. CIV. CODE arts. 1901 & 2040; Barry v. Guiffria, 120 So. 878 (La. App. Orl. Cir. 1929) (even if the principal has a good moral or business reason, this does not relieve him of liability for payment of the commission if he refuses to sell for reasons *other than* the qualifications of the prospect).

151. See text at note 231, *infra.*

context is the question of whether the principal has a duty to contract with a prospect whose offer substantially conforms with the terms stipulated in the listing agreement, but which is not a mirror image of the stipulated terms. The general rule is that the procurement of an offer, whose terms differ materially from those stipulated in the listing agreement, is *not* sufficient to create an obligation of the principal to accept the offer, to contract with the prospect, or to pay the broker a commission,[152] unless the deviation in the offer is *de minimis* or beneficial to the principal.[153] The criteria used by the courts in determining whether a principal-seller has a right to object to a purchaser's demand that the seller pay a particular cost is embodied in the following general rules: *First*, if the offer received contains conditions which, although not expressly covered by the listing agreement, are nevertheless imposed by law or implied by the terms of the listing contract, such an offer is *not* "non-conforming."[154] *Second*, the principal may not subsequently im-

152. Cramer v. Guercio, 331 So. 2d 550 (La. App. 1st Cir. 1976) (although the ultimate purchasers of the home had first been introduced by the original broker, he had never succeeded in obtaining from them a conforming offer; the court held the second broker to be the procuring cause of the transaction and not the original broker); Lindsay Realty Corp. v. Bellina, 320 So. 2d 572 (La. App. 4th Cir. 1975) (owner stipulated that the purchase price was to be paid over a 25 year credit term, but the purchaser demanded a prepayment clause without a penalty. Therefore, this was a non-conforming offer, and no commission was earned); Louisiana Co. v. Bueche, 273 So. 2d 903 (La. App. 1st Cir. 1973) (the difference between the listed price of $500.00 per acre and the offered price of $300.00 per acre made the offer a non-conforming one; thus, no commission was earned); A. Galiano, Inc. v. Barba, 24 So. 2d 825 (La. App. Orl. Cir. 1946). In *Barba* the broker was authorized to sell "property and furniture" for $12,000.00. The broker obtained an offer of $12,750.00 for the property and furniture and the linens and pots; this was *not* a conforming offer, and no commission was earned. Also, when the vendor stipulated that the vendee would pay the brokerage commission, but the offer of the vendee provided that the vendor would pay the commission, this discrepancy defeated the broker's right to a commission.

153. Annot., *What Deviation in Prospective Vendee's Proposal from Vendor's Terms Precludes Broker from Recovering Commission for Producing a Ready, Willing, and Able Vendee*, 18 A.L.R.2d 376 (1951) concludes that courts most often deny recovery of a commission when the deviation affects the (1) method or medium of payment, (2) time of payment, (3) amount of down payment, (4) insufficiency of security where the vendor demanded security, or (5) payment of a brokerage commission. Other types of deviations which frequently are held to constitute counter-offers the principal has a right to reject include variations involving easements, closing costs, furnishings and appliances, survey costs, construction of improvements, interest rates, furnishing an abstract of title, *etc.* *See* Ernest A. Carrere's Sons v. Rumore, 52 So. 2d 57 (La. App. Orl. Cir. 1951) (no meeting of the minds as to the time for surrender of possession).

154. *See* Cotter v. Figaro, 36 So. 2d 291 (La. App. 1st Cir. 1948). The *Cotter* court held the principal liable for payment of the broker's commission on the basis that the vendor was not justified in refusing to sell his property to a prospect whose offer conformed to the listing terms *except* for certain demands that the principal be responsi-

pose conditions upon the offer that were not contemplated by the brokerage agreement.[155]

Ordinarily, if the principal knowingly and voluntarily has consented to a contract which deviates from the listed terms, or has accepted a non-conforming offer to buy at less than the listed sale price, a commission is earned.[156] The commission will usually be a ratable proportion of the contracted fee.[157]

In a few cases, however, the court has rejected brokers' claims for commissions, even when the broker was the procuring cause of the sale, where the clear intent of the parties was that the commission was to be earned *only* if the sale price exceeded a minimum net amount.[158] Of course, as in all contracts, good faith is required of the principal, and therefore the broker will be entitled to a commission if the principal's fault prevented the broker from making the sale at

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ble for (1) payment of assessment charged against the property, (2) payment of existing mortgages encumbering the property, (3) payment for Internal Revenue Stamps, and (4) payment of pro-rata share of property taxes, all of which the purchaser, the court held, rightfully demanded that the seller pay.

155. *See* Veters v. Krushevski, 100 So. 2d 93 (La. App. Orl. Cir. 1958); Howell v. Thompson, 38 So. 2d 167 (La. App. 2d Cir. 1949) (owner has no right to demand that broker reduce his commission, once it was earned).

156. Flournoy v. Atlas Oil Co., 151 La. 222, 91 So. 714 (1922) (once owner ratifies change in listed terms or sells to broker's prospect on terms of counter-offer, commission is earned); Foulks v. Richardson, 87 So. 2d 335 (La. App. 1st Cir. 1956) (smaller down payment offered—and accepted by principal; thus, commission earned). *See* 12 C.J.S. *Brokers* § 86 (1938) ("The negotiation [by the broker] of a contract differing from the one he is authorized to negotiate does not entitle a broker to a commission unless the principal accedes to the departure from authority"); 12 AM. JUR. 2d *Brokers* §§ 185-87 (1964) (If an offer is negotiated by the broker which is at variance with the terms authorized by the principal, and the principal accepts the counter-offer, he is bound for the commission; but if he refuses to accept the counter-offer, he is not bound).

157. *See, e.g.*, Grace Realty Co. v. Noel, 156 La. 63, 100 So. 51 (1924); Grace Realty Co. v. Peytavin Planting Co., 156 La. 93, 100 So. 62 (1924); F. C. Williams Real Estate v. Haydel, 364 So. 2d 171 (La. App. 1st Cir. 1978); Keating v. Lachney, 216 So. 2d 906 (La. App. 1st Cir. 1968); Meyers v. Davidson, 196 So. 2d 546 (La. App. 4th Cir. 1967). *But see* Lawrence v. Bailey, 41 So. 2d 474 (La. App. 2d Cir. 1949). The *Lawrence v. Bailey* court granted the full commission despite a sale at a slightly lower price. However, the *quantum* of recovery was not disputed, and the difference between the stipulated commission and a ratable proportion was less than $25.00.

158. Meyers v. Davidson, 196 So. 2d 546 (La. App. 4th Cir. 1967) (court found that the brokerage contract was only a conditional one, *i.e.*, no commission was to be earned unless the broker *netted* $32,000.00; the court placed great emphasis on the fact that it was the broker who had solicited the brokerage contract from the principal, and not vice versa); Glover v. Griffin, 43 So. 2d 915 (La. App. 2d Cir. 1950); Munson v. Brouilette, 42 So. 2d 880, 880 (La. App. 1st Cir. 1949) ("$7900.00 net" and broker can have everything above that. The principal had sold the property for $7800.00 after the broker had "washed his hands of the deal").

the higher price or if the principal intentionally sold at a lower price in order to avoid payment of a commission.[159]

In all cases wherein the broker's principal is the *seller* of the property, the brokerage contract is presumed *not* to be a "minimum net price" agreement, and courts are hesitant to construe the brokerage contract as such.[160] But in cases in which the principal is the *purchaser*, it is presumed that the purchaser does *not* intend to pay a brokerage commission if he has to pay more than a certain *maximum* price for the property which he is seeking to buy.[161] When a purchaser hires a broker to locate suitable property for purchase, the presumed intent of the parties is that the broker will earn his commission by locating suitable property at a bargain price, lower than the (maximum) price for which the purchaser believes he could locate property himself.

Timely Performance

It is generally said that, in order to earn a commission, a broker must completely and successfully perform the duties and services required of him *prior* to the expiration of the listing agreement.[162]

159. J. R. Grand Agency, Inc. v. Staring, 156 La. 1094, 101 So. 723 (1924); Grace Realty Co. v. Peytavin Planting Co., 156 La. 93, 96, 100 So. 62, 63 (1924) ("It is well-settled that where a broker, who is employed to sell property at a given price, . . . has opened negotiations with a purchaser, and the principal, without terminating the agency or negotiations so commenced, takes into his own hands, and concludes a sale for a less sum than the price fixed, the broker is entitled, at least, to a ratable proportion of the agreed commission"); Howell v. Thompson, 38 So. 2d 167 (La. App. 2d Cir. 1949); Jeter & Monroe v. Daniels, 25 So. 2d 911 (La. App. 2d Cir. 1946).

160. Burr v. Leguin, 365 So. 2d 1156 (La. App. 3d Cir. 1979) (despite the fact that the listing agreement stipulated "$44,000.00 net to owner," the court construed the brokerage contract as giving the broker a right to 6% of *whatever* sale price was agreed to by the seller, under the rationale that $44,000.00 was just a starting figure for negotiations); Perkins & Sons v. Laborde, 271 So. 2d 658 (La. App. 1st Cir. 1972) (court ruled against allegations that the oral brokerage contract was a "minimum net price" agreement); Womack Agencies v. Fisher, 86 So. 2d 732 (La. App. 1st Cir. 1956) (although the listing agreement provided a sale price of $21,000.00 net to owner, the court held that contraditory language granting the broker a right to a commission of 5% of gross sales price gave broker a right to recover a ratable proportion on a sale of the property for less than $21,000.00).

161. *See* Lestrade v. Vanzini, 6 La. Ann. 399 (1851). In *Lestrade v. Vanzini* the commission was denied when the principal-purchaser had contracted to pay a 2% brokerage commission to the broker in return for his services in locating property for $16,000.00 ($10,000.00 cash and $6,000.00 on years' credit). The principal ultimately purchased the property for $16,000.00 *in total cash*. The court reasoned that "the interest he thus lost would amount to more than the commission claimed." *Id.*

162. Bullis & Thomas v. Calvert, 162 La. 378, 110 So. 621 (1926); Gaspard v. Siggio, 313 So. 2d 380 (La. App. 3d Cir. 1975); Lehmann v. Howard, 49 So. 2d 453 (La. App. 2d Cir. 1950); Wolf v. Casamento, 185 So. 537 (La. App. Orl. Cir. 1939). The listing agree-

However, unless the listing agreement unequivocally provides otherwise, the above-stated rule does not apply in cases wherein there is an eventual sale of the principal's property, *after* expiration of the primary term of the listing agreement, to a prospect procured by the broker through services performed *during* the brokerage contract.[163]

Implied Extension Clause

A transaction which the principal has agreed to consummate outside the time limits specified in the brokerage contract, but which began during the contract term as a result of brokerage services performed before the expiration of the employment relationship, will not defeat the broker's right to a commission if he was the procuring cause of the transaction or would otherwise have been entitled to it.[164]

Frequently, a sale of real property is made to the broker's former prospect directly by the owner after the termination of the listing agreement. Assuming that the broker actively solicited[165] the prospect before the expiration of the listing agreement, the broker often sues the principal to recover a commission, despite the fact that neither a sale nor a contract to sell was executed during the primary term of the brokerage contract. In the absence of special contractual provisions to the contrary, the issue in these cases is not whether the broker *completed* the performance of the services required of him within the term of the brokerage contract; the issue is simply whether the broker, having *begun* performance within the

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ment terminates at the expiration of its designated term, when expressly provided, or, if no term is stated, at the expiration of a reasonable time. Lewis v. Manson, 132 La. 817, 61 So. 835 (1913).

163. Womack Agencies v. Fisher, 86 So. 2d 732 (La. App. 1st Cir. 1956). In *Fisher*, a commission was granted when negotiations began during the primary term of the brokerage contract, even though a contract to sell was not executed until after the listing agreement expired. The court stated that a seller is liable for a commission if the broker was the procuring cause and if the sale was the direct, continuous result of negotiations begun during the contract term. The court distinguished other cases which held that a broker must perform within the time limits of the brokerage contract by noting that in none of those cases was the broker considered to be the procuring cause of the transaction.

164. Even if the principal has breached the listing agreement by "revoking" the broker's "authority," the courts treat this merely as an early expiration of the primary term, leaving the broker with residual rights. See note 92, *supra*.

165. *See* Jenkins v. Trott, 3 La. Ann. 671 (1848) (the mere fact of the broker's having introduced the purchaser is not sufficient in and of itself, nevertheless, if it appears that the broker's introduction was the foundation upon which negotiations proceeded, a commission is due).

time constraints of the brokerage agreement, can be considered to be the procuring cause of the (belated) sale. In every such case where the broker has been found to be the *procuring cause*, the commission has been *granted* and in every case where the broker is found *not to be the procuring cause*, the commission has been *denied*.[166] In essence, these holdings superimpose onto every brokerage contract an implied extension clause which takes effect after the expiration of the primary term in cases wherein the principal himself concludes a sale of his property to a purchaser procured by the broker.

Express Extension Clause

Many modern listing agreements incorporate an express extension clause similar to the implied extension clause imposed by the courts. However, an express extension clause generally offers greater protection to the broker. Under the jurisprudentially implied extension clause, a broker is protected beyond the term of his brokerage contract only if he is actually the procuring cause of the consummated transaction.[167] Although nothing would prohibit the inclusion into a brokerage contract of a limited express extension clause to protect the broker only when he is actually the procuring cause of a transaction completed after the brokerage agreement ex-

166. Jeter & Monroe v. Daniels, 25 So. 2d 911 (La. App. 2d Cir. 1946). *Implied extension clauses were imputed in the following cases:* Sleet v. Gray, 351 So. 2d 286 (La. App. 3d Cir. 1977); Pumilia v. Dileo, 169 So. 2d 581 (La. App. 4th Cir. 1964); Corbitt v. Robinson, 53 So. 2d 259 (La. App. 2d Cir. 1951); Wolf v. Casamento, 185 So. 537 (La. App. Orl. Cir. 1939); Viguerie v. Mathes, 120 So. 542 (La. App. Orl. Cir. 1929). *Express extension clauses were enforced in the following cases:* Dickerson v. Hughes, 370 So. 2d 1301 (La. App. 3d Cir. 1979); Garrick v. Rush, 275 So. 2d 496 (La. App. 1st Cir. 1973); Saturn Realty, Inc. v. Muller, 196 So. 2d 321 (La. App. 4th Cir. 1967); Foulks v. Richardson, 87 So. 2d 335 (La. App. 1st Cir. 1956); Howell v. Thompson, 38 So. 2d 167 (La. App. 2d Cir. 1949). In the following cases commissions were denied in situations wherein the transaction was consummated after the expiration of a listing agreement which did not contain an express extension clause, but wherein the court relied on the fact, not that performance was belated, but that the broker was found not to be the procuring cause of the transaction: Sleet v. Williams, 291 So. 2d 495 (La. App. 3d Cir. 1974); Doiron v. Reed, 25 So. 2d 630 (La. App. 1st Cir. 1946); Belvin v. Mansfield Hardwood Lumber Co., 1 So. 2d 804 (La. App. 2d Cir. 1941). Express extension clauses were held inapplicable in the following cases because the court found the broker *not* to be the procuring cause of the transaction: Bullis & Thomas v. Calvert 162 La. 378, 110 So. 621 (1926); Ford v. Shaffer, 143 La. 635, 79 So. 172 (1918); George E. Newell & Son v. Terrytown New Orleans Corp., 193 So. 2d 389 (La. App. 4th Cir. 1966); Doiron v. Reed, 25 So. 2d 630 (La. App. 1st Cir. 1946); Myevre v. Davila, 10 So. 2d 119 (La. App. Orl. Cir. 1942).

167. Kirkland v. Bray, 241 So. 2d 601 (La. App. 2d Cir. 1970) (the court will not infer an implied extension clause where the broker was not the procuring cause).

pires, the language of most express extension clauses affords broader protection to the broker. Under the provisions of many express extension clauses, the broker need not prove that he was the procuring cause of the eventual transaction; he need only show that he "quoted"[168] the property to the eventual purchaser, or that the ultimate purchaser was "interested in" or "introduced to" the property by the broker[169] or that the broker "offered"[170] or "exhibited"[171] or "submitted"[172] the property to the customer, or that the broker "negotiated"[173] for the sale of the property. In these cases, if the broker qualifies under the prerequisite language of the express extension clause, (*e.g.*, as having quoted, offered, or submitted the property), his right to a commission is absolutely protected should the property be sold to that particular prospect, regardless of *who* was the procuring cause.[174] However, while the broker is sometimes relieved under an express extension clause from having to prove that he was the procuring cause, the broker is always required to prove that his active efforts on the principal's behalf were at least a causal factor in the sale.[175]

It often seems that Louisiana courts are inconsistent in their enforcement of express extension clauses, sometimes placing lenient interpretations upon them and sometimes giving them a strict construction.[176] However, this seeming inconsistency is more apparent

168. *See, e.g.*, Searcy v. Jacobs, 151 So. 2d 166, 169 (La. App. 4th Cir. 1963) ("quote" means "to offer the property and state the price asked"); Coppage v. Camelo, 330 So. 2d 695 (La. App. 4th Cir. 1976); Ruiz v. Kiehm's Pharmacy, 37 So. 2d 720 (La. App. Orl. Cir. 1948).

169. *See, e.g.*, Carter v. Hayes, 337 So. 2d 295 (La. App. 2d Cir. 1976) (such interest must lead directly to the sale; the mere fact that the broker in some way aided the sale is not sufficient).

170. *See, e.g.*, Langford v. Pioneer Land Co., 250 So. 2d 165 (La. App. 1st Cir. 1971).

171. *See, e.g.*, Carey v. Humble, 212 So. 2d 439 (La. App. 2d Cir. 1968).

172. *See, e.g.*, Harvey v. Sims, 198 So. 389 (La. App. Orl. Cir. 1940).

173. *See, e.g.*, Bullis & Thomas v. Calvert, 162 La. 378, 110 So. 621 (1926); Ruiz v. Kiehm's Pharmacy, 37 So. 2d 720 (La. App. Orl. Cir. 1948) ("negotiate" means more than "quote").

174. *See* Carter v. Hayes, 337 So. 2d 295 (La. App. 2d Cir. 1976). The *Carter v. Hayes* court granted the commission to a broker who qualified under the language of an express extension clause because he had "interested" the eventual purchaser in buying the *type* of property which the vendor had for sale (*i.e.*, a rice farm) even though the buyer, at the expiration of the primary term of the brokerage contract, had not yet been told even the name of the vendor or the location or the price of the property.

175. *See* Ruiz v. Kiehm's Pharmacy, 37 So. 2d 720 (La. App. Orl. Cir. 1948) (commission denied where the property had been "quoted" by the owner and not by the broker).

176. *Compare* Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973), *with* Carey v. Humble, 212 So. 2d 439 (La. App. 2d Cir. 1968).

than real because, as is so often the case in fact-sensitive areas, the rationale used by the court is heavily influenced by the desired result. The operative factors relied on by the court in determining which construction to use are not always overtly discussed, but it is evident that the outcome is largely dependent upon the court's analysis of whether the broker was the procuring cause of a consummated transaction and on the status of the negotiations at the time of the expiration of the extension period, as well as on the extent to which the broker's active efforts had contributed to success.[177] If it is established that the broker's negotiations were nearing the stage of completion at the expiration of the brokerage contract, the court may find that the principal, in bad faith, is trying to evade payment of a commission by delaying the sale until the extension period ends.[178] The court may further protect the broker, if the purchaser is related in some way to someone who was the broker's prospect, by looking behind the identity of the nominal purchaser. The commission will be granted if the court finds that the "true" purchaser was procured by the broker.[179]

Some listing agreements expressly specify that a commission may be earned under an express extension clause if even a contract to sell is executed during the extension period.[180] Even in cases wherein an express extension clause requires a sale during the extension period in order to vest a commission right, if the broker is found to be the procuring cause of the transaction, the court does not require that the formal contract of sale be executed before the expiration of the extension period.[181] To the contrary, in many cases wherein the court has found the broker *not* to be the procuring cause of the transaction, the court often relies, among other reasons, on the fact that a sale was not consummated within the extension period as a basis for denying recovery of a commission.[182]

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177. *See* Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973); Cruse v. Brascato, 28 So. 2d 56 (La. App. 2d Cir. 1946).

178. *See* Treadway v. Lambert & Sarraxin, 96 So. 2d 115 (La. App. Orl. Cir. 1957).

179. *See, e.g.*, Garrick v. Rush, 275 So. 2d 496 (La. App. 1st Cir. 1973) (commission granted when the owner sold the property during the extension period to the son of the broker's prospects. The broker had been the first to introduce the parents to the property); Adair v. Fleming, 68 So. 2d 215 (La. App. 2d Cir. 1953); Ruiz v. Treadaway, 17 So. 2d 378 (La. App. Orl. Cir. 1944) (commission granted to broker who "quoted" the property to the mother and aunt of the ultimate purchaser).

180. *See, e.g.*, Curuso-Goll v. LA NASA, 72 So. 2d 13 (La. App. Orl. Cir. 1954); Zollinger v. Gust, 192 So. 132 (La. App. Orl. Cir. 1939).

181. *See* Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973).

182. *See, e.g.*, Langford v. Pioneer Land Co., 250 So. 2d 165 (La. App. 1st Cir. 1971) (although the broker had "offered" the property to the ultimate purchaser during the primary term of the brokerage contract, a commission was denied under the express extension clause because the sale had been completed outside the extension period and

The express extension clause of many listing agreements provides an express exception, *i.e.*, that the extension clause does not apply if the property is listed exclusively with another broker. However, even without an express provision for such an exception, the extension clause has been held to protect brokers only when the subsequent sale is completed directly through the principal himself, as opposed to consummation through a second broker.[183]

Frequently, listing agreements require the principal to refer all prospects to the broker during the term of the listing. Such clauses prevent the principal from interfering in any way with the broker's solicitation of prospects.[184] Louisiana courts have indicated a willingness to enthusiastically enforce such clauses.[185] Non-interference clauses have their greatest impact in extension clause disputes.

If the principal breaches a non-interference clause by neglecting to refer to a prospect to the broker, the broker may, upon a subsequent sale of the property to that prospect, claim a commission on the ground that the principal's breach substitutes for the broker's performance under an extension clause.[186] Unless the broker had

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because the sale was a result of a new and independent set of negotiations that had begun after the original negotiations were discontinued); Carey v. Humble, 212 So. 2d 439 (La. App. 2d Cir. 1968) (same; although the broker had "exhibited" the property to the eventual purchaser as required by the extension clause provision, commission was denied because the sale had occurred outside the extension period. The court found that there the original negotiations had failed and that the sale was a result of new and independent negotiations).

183. *See* Cramer v. Guercio, 331 So. 2d 550 (La. App. 1st Cir. 1976) (the court interpreted an extension clause which provided for a commission to be paid to the broker "in the event of a sale by me/us within 6 months of expiration of listing" as being not applicable to a sale through a second broker. The court was impressed by expert testimony on this point, *i.e.*, that the custom in the business was to protect brokers against the bad faith of the owner-principal only.) Older cases had held that if a principal executed an exclusive listing with a second broker on property on which an extension clause applied in favor of a previous broker, the principal could be held liable for two commissions. *See, e.g.*, Englemann v. Auderer, 121 So. 194 (La. App. Orl. Cir. 1929).

184. Such clauses are hereinafter referred to as "non-interference clauses."

185. *See* Harvey v. Riedlinger, 17 So. 2d 60 (La. App. Orl. Cir. 1944) (commission granted under an express extension clause when the principal had breached his obligation to refer all prospects to the broker, despite the fact that the broker would not otherwise have qualified under the language of the extension clause because he had not "submitted" the property).

186. *See, e.g.*, Coppage v. Woodward, 105 So. 2d 306 (La. App. 1st Cir. 1958) (commission granted under an express extension clause. Although the court found that, in this particular case, the broker actually was the procuring cause of the transaction, the court nevertheless stated, in dictum, that even if the broker had had no contacts with the prospect during the primary term of the brokerage contract, the commission would still be due as a result of the breach by the owner in not referring the prospects (ultimate purchasers) to the broker).

notice of the breach of the non-interference clause and nevertheless declined to solicit the prospect's interest,[187] or unless the broker was already aware of the prospect's existence,[188] it is presumed that the broker could have accomplished any transaction which was accomplished by the owner.[189] Thus, the principal's breach of a non-interference clause may be a viable basis for a broker's commission claim in cases wherein a sale has been made to a prospect whom the principal was under a duty to refer to the broker.

Concept of Procuring Cause

Definition

> 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 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.[190]

It has been held that the mere showing of property by a broker does not, in and of itself, render the broker the procuring cause of a

187. *See* Acadian Inv. Co. v. Laird, 138 So. 2d 429, 432 (La. App. 3d Cir. 1962) (commission denied under an express extension clause where, although the owner had violated the non-interference clause, the broker knew of the breach and even went to see the prospect himself. But the broker failed to try to negotiate with the prospect and in fact treated the brokerage contract as if it were terminated; therefore, "[t]he reason for the rule failing, then the rule itself must fail, with the result that plaintiff [broker] can not recover under the doctrine of the cases heretofore discussed").

188. *See* Latter & Blum, Inc. v. Grand Lodge of La., 357 So. 2d 1194 (La. App. 4th Cir. 1978) (commission denied because, although the owner did not refer a prospect to the broker, the owner had not violated the non-interference clause because the broker was already aware that the prospect had been interested in the principal's property, and the owner did nothing to interfere with the broker's solicitation of the prospect).

189. *See* Doll v. Thornhill, 6 So. 2d 793 (La. App. Orl. Cir. 1942) (it is no defense that, even if the owner had complied and referred the prospect to the broker, no sale would have taken place. The court did not accept the defendant's argument that the difference between the maximum price the buyer would pay and the minimum price the owner would accept did not include the amount of the broker's commission).

190. Sleet v. Harding, 383 So. 2d 122, 124 (La. App. 3d Cir. 1980), *quoting* 12 C.J.S., *Brokers* § 91, at 208 (1938). Under the language of some express extension clauses, a broker may recover a commission if he proves merely that his affirmative actions were a contributing cause of the sale, whereas under the definition of "procuring cause," a broker must show more than the mere fact that his actions in some way aided the sale.

subsequent transaction.[191] Although a finding that a broker was the procuring cause of a transaction requires proof of active efforts on the broker's part,[192] it is possible for a court to find that a broker was the procuring cause of a transaction solely upon a showing that he advertised the principal's property when the advertisements first interested the ultimate purchaser in the principal's property.[193]

The notion of procuring cause is a key element in many of the compensation claims made by brokers. Directly or indirectly, the answer to this crucial issue is decisive to the outcome of most brokerage fee litigation. The concept of "procuring cause," however, is a very evasive one, and a given fact situation may be susceptible to conflicting opinions as to whether, under the circumstances, the broker was the "procuring cause" of the transaction.[194] It is therefore helpful to examine the most prominent factors that are considered, overtly or covertly, by courts in making determinations of procuring cause issues.

Relevant Factors

By analogy to the "but for" test used by courts in determining proximate cause issues in tort cases,[195] the courts often look first to see whether the prospect who ultimately purchased the property knew about the property before being contacted by the broker.[196] In fact, it is possible for a court to find that the broker was the procuring cause of a transaction where he did nothing more than introduce the prospect to the principal's property.[197] It should be noted,

191. Rosenblath v. Brumfield, 15 So. 2d 474 (La. App. 2d Cir. 1943).

192. Lehmann v. Howard, 49 So. 2d 453 (La. App. 2d Cir. 1950).

193. Sollie v. Peoples Bank & Trust Co., 194 So. 116 (La. App. 2d Cir. 1940).

194. *See* Dew v. Hunter, 66 So. 2d 400, 402 (La. App. 2d Cir. 1953): "Whether or not a broker has procured a purchaser and his services are the proximate cause of a sale is an issue of fact. In every such case the circumstances vary to the extent that each case must be decided on its own particular factual situation."

195. *See* Comment, *Proximate Cause in Louisiana*, 16 LA. L. REV. 391 (1956).

196. In the following cases commissions were granted: Dickerson v. Hughes, 370 So. 2d 1301 (La. App. 3d Cir. 1979) (broker was first to introduce prospect); Garrick v. Rush, 275 So. 2d 496 (La. App. 1st Cir. 1973) (broker was first to introduce the parents of the ultimate purchaser to the property); Perkins & Sons v. Laborde, 271 So. 2d 658 (La. App. 1st Cir. 1972) (broker was first to introduce prospect); Ducournau v. Hendricks, 159 So. 2d 736 (La. App. 3d Cir. 1964) (same). But in the following cases commissions were denied: Coppage v. Camelo, 330 So. 2d 695 (La. App. 4th Cr. 1976) (broker was not the first to introduce prospect); Myevre v. Davila, 10 So. 2d 119 (La. App. Orl. Cir. 1942) (same; prospect had seen the property advertised by owner in newspaper and was merely by chance with the broker, looking over other properties, when he mentioned to the broker that he would like to see the principal's property).

197. *See* Myevre v. Norton, 6 So. 2d 215, 217 (La. App. Orl. Cir. 1942) (the broker "sent the prospect over"; The brokers services were generally available, but the prin-

however, that the fact that the broker was the first to introduce the purchaser to the principal's property is only one of several significant factors considered by courts. Therefore, it is possible for a broker to be denied a commission in spite of the fact that he was the first to introduce the prospect to the principal's property, if the broker is nevertheless held not to be the procuring cause of the transaction.[198]

A more equivocal factor considered by the courts is the relative success or failure of the negotiations conducted by the broker. A broker generally is denied a commission if the sale of the principal's property took place, not as a result of bargaining conducted by the broker, but as a result of new and independent discussions between the parties after the original negotiations had broken down.[199] Subfactors viewed by the court as indicative of success or failure of negotiations may include the continuity or discontinuity of the original and final negotiations,[200] the length of time elapsing between the broker's negotiations and the final sales agreement,[201] and the

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cipal carried on all negotiations himself. On the basis of a subsequent sale by the owner to the prospect, the court granted recovery of a brokerage commission).

198. *See, e.g.*, Freeman & Freeman v. Torre Realty & Improvement Co., 157 La. 1093, 103 So. 334 (1925) (the broker was the first to introduce the prospect to the principal's property. The prospect originally rejected the broker's suggestions, refused to make an offer, but finally concluded the sale through another broker; commission denied. The court concluded that the broker's actions, although helpful, were not the procuring cause of the sale); Ford v. Shaffer, 143 La. 635, 79 So. 172 (1918) (broker was first to introduce the prospect, but the prospect was absolutely uninterested and refused to negotiate. The owner subsequently sold directly to the prospect at a price greater than the listed price; commission denied); Crasto v. Pohlman, 127 So. 89 (La. App. Orl. Cir. 1930) (broker was the first to introduce the prospect, yet the broker never informed the principal of finding a prospect. The principal sold through another broker; commission denied).

199. *See, e.g.*, Sleet v. Williams, 291 So. 2d 495 (La. App. 3d Cir. 1974); Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973); Cobb v. Saucier, 30 So. 2d 784 (La. App. 2d Cir. 1947).

200. *See* George E. Newell & Son v. Terrytown New Orleans Corp., 193 So. 2d 389 (La. App. 4th Cir. 1966); Wittenberg v. McGrath, 3 La. App. 244 (Orl. Cir. 1925) (time lapse of over 6 months; commission denied. The court stated that the new negotiations which were initiated after the failure of the earlier negotiations "had nothing to do with" the earlier attempt to sell).

201. *See* Coppage v. Camelo, 330 So. 2d 695 (La. App. 4th Cir. 1976) (time lapse of 4 months; commission denied); Turner v. Swann, 124 So. 717 (La. App. 2d Cir. 1929) (one year time lapse; commission denied); Shumake v. Gremillion, 4 La. App. 305 (2d Cir. 1926) (time lapse of 60 days; commission denied). *See also* Hamberlin v. Bourgeois, 289 So. 2d 358, 361 (La. App. 1st Cir. 1973) (finding the broker to be the procuring cause of the transaction and therefore granting him recovery of a commission, the court stated: "This is not a case where the buyer had abandoned his intention to purchase and become interested in the property again at a later date. Rather, we have here a continuous uninterrupted transaction"); Saturn Realty, Inc. v. Muller, 196 So. 2d 321 (La.

development of a new, different, or independent motive for the prospect to purchase.[202] These sub-factors are not determinative in and of themselves, but are merely used by the courts to ascertain whether the broker's negotiations were successful. It is quite possible, in spite of a relatively short time lapse, for a court to find that the broker's negotiations failed.[203] Conversely, it is quite possible for a court to find that, despite an apparent interruption or discontinuity in the interchange between the parties, the eventual sale was a result of the original negotiations.[204]

Another important factor courts consider in deciding whether a broker was the procuring cause of a transaction is whether or not he abandoned efforts to negotiate the transaction with a particular prospect.[205] Still another factor, given great weight by courts in making determinations of procuring cause issues, is the good or bad faith of the principal and the broker. If a court finds the principal to be in bad faith (*i.e.*, suspects that the principal is purposely trying to evade payment of a commission rightfully due to the broker), a com-

App. 4th Cir. 1967) (small time lapse of only one week, so broker was the procuring cause; commission granted).

202. *See, e.g.*, Gamblin v. Young, 187 So. 854 (La. App. 2d Cir. 1939). In *Gamblin* the prospect initially was not interested in buying the subject property (a home under construction) because his stay in Shreveport was for an indefinite length of time. However, after the prospect's refusal to buy the house, his wife, watching the house construction, eventually began to desire the house and finally talked her husband into buying it directly through the owner. The court found that the broker was not the procuring cause of the transaction.

203. *See, e.g.*, Doiron v. Reed, 25 So. 2d 630 (La. App. 1st Cir. 1946) (despite an extremely short time lapse of just a few days, the court found that the original negotiations conducted by the broker had failed, were abandoned, and that the subsequent sale of the principal's property took place under new and independent negotiations; commission denied).

204. *See, e.g.*, Bennett v. Bobby J. Gauthier Contractor, Inc., 242 So. 2d 595 (La. App. 1st Cir. 1970) (court found the broker to be the procuring cause of the sale, despite the fact that the buyer had torn up the purchase agreement negotiated by the broker, when the buyer had eventually purchased on similar terms directly through the owner; commission granted).

205. In the following cases the brokerage was denied: Munson v. Brouilette, 42 So. 2d 880, 881 (La. App. 1st Cir. 1949) (the broker "washed his hands of the deal"); Gamblin v. Young, 187 So. 854, 855 (La. App. 2d Cir. 1939) (after the broker learned that his prospect had already committed himself to another lease, the broker "had no further dealings with him"); Rosenthal v. Cangelosi, 164 So. 502, 504 (La. App. 1st Cir. 1935) (broker informed lessee that he was "through with the deal and had dropped it"); Fellman v. Ecuyer, 2 La. App. 398 (Orl. Cir. 1925) (broker had left the city for his vacation and did not even attempt to protect his commission). In the following cases the brokerage commission was granted: Dickerson v. Hughes, 370 So. 2d 1301 (La. App. 3d Cir. 1979) (court found that broker had not abandoned the listing contract); Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973) (same).

mission will be granted.[206] However, the mere fact that the principal is in good faith does *not* necessarily warrant the conclusion that the broker was *not* the procuring cause of the transaction.[207] One meaningful indicator of bad faith is the principal's awareness or knowledge that the customer was the broker's prospect.[208] The knowledge or awareness indicator becomes even more significant if coupled with the possibility of prejudice to the principal (*e.g.*, potential liability on the part of the principal for more than one commission to more than one broker),[209] or if the principal's unawareness was caused by the negligence or bad faith of the broker.[210]

As discussed earlier,[211] if the broker was the procuring cause of a transaction, it is generally irrelevant that the consummation was on terms and conditions less favorable than those stipulated in the listing agreement or made at a price lower than the listed price, so long as the principal consented to the modification in terms. In fact, if the difference between the sale price and the listed price is exactly

206. *See, e.g.*, Garrick v. Rush, 275 So. 2d 496 (La. App. 1st Cir. 1973) (commission granted where the court suspected collusion between the principal and the purchaser to avoid payment of the brokerage commission); Howell v. Thompson, 38 So. 2d 167 (La. App. 2d Cir. 1949) (owner found to be in bad faith and so held liable for brokerage commission); Wolf v. Casamento, 185 So. 537 (La. App. Orl. Cir. 1939) (court found that secret negotiations and collusion had taken place between the principal-owner and the purchaser; commission granted).

207. *See, e.g.*, Hamberlin v. Bourgeois, 289 So. 2d 358 (La. App. 1st Cir. 1973) (commission granted where the principal was not in bad faith); Saturn Realty, Inc. v. Muller, 196 So. 2d 321 (La. App. 4th Cir. 1967) (same).

208. In the following cases a commission was *granted*: Ducournau v. Hendricks, 159 So. 2d 736 (La. App. 3d Cir. 1964) (principal-owners knew that the ultimate purchaser had been introduced first by the broker); Jeter & Monroe v. Daniels, 25 So. 2d 911 (La. App. 2d Cir. 1946) (owner had knowledge of the fact that the broker had been negotiating with the prospect); Wolf v. Casamento, 185 So. 537 (La. App. Orl. Cir. 1939) (same). In the following cases a commission was *denied*: Bullis & Thomas v. Calvert, 162 La. 378, 110 So. 621 (1926) (no knowledge on the part of the principal that the purchaser was the broker's prospect); Freeman & Freeman v. Torre Realty & Improvement Co., 157 La. 1093, 103 So. 334 (1925) (owner did not know that the broker, through whom the final negotiations were completed, was not the same person as the broker who had first introduced the prospect); Lewis v. Manson, 132 La. 817, 61 So. 835 (1913) (owner had no knowledge that the broker had any contact with the purchaser's agent).

209. *See, e.g.*, Crasto v. Pohlman, 127 So. 89 (La. App. Orl. Cir. 1930) (commission denied to original broker where the principal was unaware that the purchaser was the original broker's prospect, and had already paid a brokerage commission to another broker); Shumake v. Gremillion, 4 La. App. 305 (La. App. 2d Cir. 1926) (two brokers both claiming commissions under the same brokerage contract from the same principal; commission denied to the broker of whom the principal was unaware).

210. *See, e.g.*, Harvey v. Aronson, 3 La. App. 751 (Orl. Cir. 1926) (broker had failed to disclose the identity of his prospect to the principal).

211. See note 156, *supra*, and accompanying text.

equal to the amount of commission the broker was to have earned, this may be viewed as circumstancial evidence of bad faith on the part of the principal and/or customer.[212] However, in cases where the eventual transaction took place on terms less favorable to the customer (*e.g.*, where the sale was consummated at a sale price *greater than* the listed price), this circumstance is indicative that the earlier negotiations had indeed failed; otherwise it is difficult to see why the customer would not have transacted on the earlier, more favorable terms.[213]

Similarly, when the broker is found to be the procuring cause of a particular transaction, it is irrelevant that the sale was concluded directly through the principal himself.[214] Finally, in order to reach a conclusion on a procuring cause issue, courts analyze all of the above factors in the light of overriding considerations of fairness.[215]

Failure of Customer or Principal to Consummate the Final Transaction

Default of a Customer on a Contract to Sell

Where a principal hires a broker to sell his property, for the seller to be liable for the brokerage commission, the broker must procure a ready, willing, and able purchaser who executes a valid and binding contract of sale with the principal.[216] If the customer procured by the broker defaults on obligations under a contract to

212. *See* J. R. Grand Agency, Inc. v. Staring, 156 La. 1094, 101 So. 723 (1924); Garrick v. Rush, 275 So. 2d 496 (La. App. 1st Cir. 1973); Jeter & Monroe v. Daniels, 25 So. 2d 911 (La. App. 2d Cir. 1946).

213. *See* Ford v. Shaffer, 143 La. 635, 79 So. 172 (1918) (listed price of property was $40.00 per acre, including the cattle. Broker was unable to advance negotiations between the prospect and the principal at that price, but the owner subsequently sold to the same prospect for $37.50 per acre *plus* an additional sum for the cattle, which raised the total sale price to over $40.00 per acre; the court found that the original negotiations had failed, and the broker was denied a commission); Belvin v. Mansfield Hardwood Lumber Co., 1 So. 2d 804 (La. App. 2d Cir. 1941) (eventual sale took place 1-½ years later than the original negotiations and at a higher sale price; commission denied).

214. Dickerson v. Hughes, 370 So. 2d 1301 (La. App. 3d Cir. 1979); Slimer v. White, 275 So. 2d 468 (La. App. 2d Cir. 1973); Dew v. Hunter, 66 So. 2d 400 (La. App. 2d Cir. 1953); White v. Havard, 25 So. 2d 108, 110 (La. App. 2d Cir. 1946) ("We are forced to conclude that [the broker's] efforts were . . . the procuring cause of the sale . . .").

215. *See, e.g.*, Bullis & Thomas v. Calvert, 162 La. 378, 383-84, 110 So. 621, 623 (1926) ("[The issue is whether] it would be unfair, and contrary to the intent of the parties, that they [the brokers] should be deprived of the fruits of their labor by the mere circumstance that the sale was not completed before the expiration of the extension contemplated by the contract").

216. See note 102, *supra*, and accompanying text.

sell or a purchase agreement, the broker may not claim a commission *from the seller*.[217] Similarly, if the contemplated transaction was to be an exchange which was not consummated as a result of a defect in the title of the customer procured by the broker, the broker has no claim for a commission *against the principal*.[218] A defaulting customer, however, may be liable for payment of the brokerage commission under the express terms of the purchase agreement, as a consequence of his nonperformance.[219] However, a decree of specific performance rendered against a reluctant purchaser relieves him of any liability for the brokerage commission based upon his default.[220] Whether or not the purchaser has defaulted is a question of law to be decided by the court,[221] but the issue of the purchaser's default cannot be litigated collaterally in a suit by the broker against the principal-owner for a brokerage commision; the customer must be joined as a defendant in the litigation.[222]

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217. *See* Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932) (the supreme court stated that it has long disfavored clauses that provide for payment of brokerage fee upon acceptance); Puckett v. Broussard, 356 So. 2d 1021 (La. App. 1st Cir. 1977); Adams v. Adams, 283 So. 2d 503 (La. App. 1st Cir. 1973); C. J. Tessier, Inc. v. Wedderin, 59 So. 2d 219, 219 (La. App. Orl. Cir. 1952) (court refused to hold principal-seller liable for commission upon purchaser's default, despite express contractual language in the breached purchase agreement providing that "the commission is earned upon the signing of this agreement"); McKelvy v. Milford, 37 So. 2d 370 (La. App. 2d Cir. 1948) (the court ignored express contractual language providing that the commission was to be earned upon the mere signing of the purchase agreement and held the seller *not liable* for the commission where the purchaser defaulted).

218. *See* Spiro v. Corpora, 174 So. 145 (La. App. Orl. Cir. 1937).

219. *See, e.g.*, Probst v. Digiovanna, 232 La. 811, 95 So. 2d 321 (1957) (defaulting purchaser held liable for commission under express contractual provision requiring the defaulting party to pay the brokerage commission); Wendel v. Dixon Real Estate Co., 232 So. 2d 791 (La. App. 4th Cir. 1970) (penalty provision imposing contingent liability on a purchaser in the event of his default is not contrary to public policy and will be given full effect); Dane & Northrop v. Selzer, 63 So. 2d 760 (La. App. Orl. Cir. 1953) (defaulting purchaser held liable for commission if contract to sell contained express provision to that effect); Blache v. Goodier, 22 So. 2d 82 (La. App. Orl. Cir. 1945) (court awarded commission to broker, to be paid by the defaulting purchaser, as per default provision of purchase agreement, despite the fact that the broker also earned another commission on the same property from a different buyer).

220. Hunley v. Ascani, 174 La. 712, 141 So. 385 (1932).

221. *See, e.g.*, Adams v. Spillman, 290 So. 2d 726 (La. App. 1st Cir. 1974) (court found that the proposed sale was "per aversionem" and therefore the purchaser had no right to refuse to buy because of diminished acreage. Since the court found the purchaser to be in default, the principal-seller was relieved of liability for payment of the commission); Treadaway v. Piazza, 156 So. 2d 328 (La. App. 4th Cir. 1963) (court held that a condition in a contract to sell making the sale subject to the purchaser's obtaining financing through a homestead loan constituted a suspensive condition, and, therefore, when the purchaser in good faith was unsuccessful in obtaining the desired loan, this did not constitute "default" on the purchaser's part).

222. Leaman v. Rauschkolb, 199 So. 663 (La. App. Orl. Cir. 1941).

As a corollary of the general rule that a broker has no right to a commission unless he has procured a ready, willing, and able customer who enters into a binding contract with the principal, the well-established rule is that, since an earnest money contract is not binding, a broker earns no commission rights for the execution of an earnest money contract.[223] Consequently, a broker is not entitled to deduct a commission from forfeited earnest money. The same rule applies to forfeited "deposits,"[224] *i.e.*, the principal is entitled to the whole of the forfeited deposit, to the exclusion of the broker.[225] In fact, even in cases wherein the purchase agreement contains express language granting the broker a right to retain his commission from a forfeited simple deposit, the courts sometimes have ignored this language and have refused to enforce it.[226]

There may be some exceptions when the broker would have the right to retain his commission out of a forfeited deposit. For instance, if the principal voluntarily released the purchaser, thus prejudicing the broker's rights, the broker may be able to claim a commission out of any sums retained by the principal.[227] In addition, if the principal manifested an absolute intent to pay a commission "in any event," the broker may have rights to a forfeited deposit.[228] Also, it appears that if the purchase agreement provides for a *double* penalty, half of which is kept by the principal and half of which goes to the broker as his fee, this clause will be enforced.[229] It

223. Bruno v. Serio, 50 So. 2d 78 (La. App. Orl. Cir. 1951).

224. Note that courts treat "deposits" as earnest money unless expressly stipulated otherwise or unless the parties expressly reserve the right to specific performance. Haeuser v. Schiro, 235 La. 909, 106 So. 2d 306 (1958).

225. 12 AM. JUR. 2d *Brokers* § 210 (1964), *citing* Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Bruno v. Serio, 50 So. 2d 78 (La. App. Orl. Cir. 1951); Nettles v. Vignes, 49 So. 2d 371 (La. App. Orl. Cir. 1950).

226. *See* Bruno v. Serio, 50 So. 2d 78 (La. App. Orl. Cir. 1951). Despite contractual language giving the broker the right to retain his commission out of a forfeited simple deposit, the *Bruno* court concluded that the broker had no interest in the forfeited deposit. The court distinguished *Jourdan v. Jones*, 33 So. 2d 416 (La. App. Orl. Cir. 1948), which enforced a similar contractual provision, saying that in *Jourdan*, the owner voluntarily acknowledged the broker's right to retain the commission, whereas in the instant case this issue was in contest. *See* Nettles v. Vignes, 49 So. 2d 371 (La. App. Orl. Cir. 1950).

227. Boone v. David, 52 So. 2d 563 (La. App. 2d Cir. 1951) (owners voluntarily released the purchaser and were thus held liable for payment of the brokerage commission).

228. Maloney v. Aschaffenburg, 143 La. 509, 78 So. 761 (1917).

229. Wendel v. Dixon Real Estate Co., 232 So. 2d 791 (La. App. 4th Cir. 1970). The *Wendel* court enforced the following contractual provision giving the broker a right to retain a commission out of a forfeited double penalty. "In the event the purchaser fails to comply with this agreement within the time specified, the seller shall have the right to demand the deposit plus an equal amount as penalty *less the agent's commission.*" *Id.* at 794 (emphasis added).

should be noted that, at common law, the parties are completely free to stipulate as to the disposition of a forfeited sum, and common law courts apparently are more willing to uphold and enforce *any* provision agreed to by the parties—even with respect to forfeiture of simple deposits.[230]

Default of the Principal

When a property owner hires a broker to sell his property, he makes two promises to the broker. The first is an implied promise that the principal will willingly sell his property to any ready, willing, and able customer procured by the broker.[231] Of course, this obligation to sell becomes absolute only if and when the broker does in fact procure such a purchaser. The second promise is the principal's *express* promise to pay the brokerage commission, which becomes absolute when the sale has been consummated. These two promises exist independently of one another. As a general rule, in cases in which the brokerage agreement contains no term, the owner will not be held liable for payment of a brokerage commission if he changes his mind and takes his property off the market *before* the broker has procured a ready, willing, and able customer. Even when the brokerage contract provides that the listing must remain open for a specified time, if the principal breaches by wrongfully terminating the listing before it expires, the result usually will be the same. Since incidental expenses incurred by the broker usually are not recoverable, in order to obtain damages, a broker ordinarily must show that he has been deprived of his right to collect an earned commission, *i.e.*, that the broker had procured a qualified customer at the time of the principal's breach.[232] However, in brokerage con-

230. *See* Annot., *Real Estate Broker's Right to Commission as Affected by Failure or Refusal of Customer (Prospect) to Comply with Valid Contract*, 74 A.L.R.2d 468 (1960); 12 AM. JR. 2d *Brokers* §§ 209-10 (1964):

> The right of the broker to a commission where the down payment or earnest money has been forfeited may be controlled by an agreement between the broker and his principal for the division between them of the forfeited money. . . . [T]he relative rights of a broker and his vendor to a down payment or earnest money forfeited to the vendee for the latter's default under a real estate contract depend generally upon the terms and provisions of the particular contract.

231. *See* Comment, *The Implication of a Promise to Buy or Sell into a Real Estate Brokerage Contract: An Analysis of the Ready, Willing and Able Theory*, 114 U. PA. L. REV. 380 (1966).

232. Stevens v. Tynes, 357 So. 2d 7 (La. App. 3d Cir. 1978). Despite the fact that the principal wrongfully revoked the broker's authority to sell prior to the expiration of the listing agreement, the *Stevens* court refused to hold the principal liable for payment of the brokerage commission. The court cited Civil Code article 2040 ("The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it"), but interpreted that article to mean that the broker must prove

tracts which contemplate extremely large advertising expenditures, the courts might be persuaded to award damages *other than* loss of commission, if the equities are compelling enough to convince the court to deviate from the normal rule. Of course, once the broker has succeeded in procuring a ready, willing, and able customer, the principal no longer may change his mind about selling his property; once the principal's implied promise has become absolute, he no longer may refuse to accept the prospect or refuse to contract with him.[233] If the principal then changes his mind, refuses to accept a ready, willing, and able customer procured by the broker, or refuses to complete the transaction, the principal may be liable for the brokerage commission as a result of the breach of his implied obligation under the listing agreement.[234]

Analytical problems arise, however, in cases wherein the owner has hired a broker on the condition that the commission will be paid *by the customer* or in those cases in which a prospective purchaser has hired a broker, requiring him to seek remuneration from the seller. In these situations, where the broker has successfully procured a ready, willing, and able customer only to have the principal

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that, *but for* the principal's wrongful revocation, the broker would have succeeded in procuring a ready, willing, and able customer on terms conformable to those stipulated in the listing agreement. However, if the contract is one which would be characterized at common law as *bilateral*, the principal's offer to list the property, once accepted by the broker, may be regarded as absolutely irrevocable. *See* Comment, *Real Estate Brokerage in Louisiana*, 17 LA. L. REV. 820 (1957). However, under the common law theory of bilateral contracts, there must be some consideration given on both sides. It is generally considered that mere permission from the principal for the broker to sell property does not constitute a bilateral agreement absent some consideration or expenditures on the part of the broker. *See* Annot., *Broker's Right to Commission on Sales Consummated After Termination of Employment*, 27 A.L.R.2d 1348 (1953).

233. Williams v. Cormier, 100 So. 2d 307 (La. App. 1st Cir. 1958) (principal held liable for commission where he voluntarily released the purchaser and prevented the consummation of the sale by selling to a third person); Boone v. David, 52 So. 2d 563 (La. App. 2d Cir. 1951) (principal held liable for commission where he voluntarily released purchaser without obtaining broker's consent); Spiro v. Corpora, 174 So. 145 (La. App. Orl. Cir. 1937); Ernest A. Carrere's Sons v. Edstrom, 119 So. 284 (La. App. Orl. Cir. 1928) (holding the principal-lessor liable for payment of the brokerage commission). The *Edstrom* court stated that it was apparent that the principal-lessor simply changed her mind, *i.e.*, refused to go forward with the transaction once the broker had succeeded in procuring a ready, willing, and able tenant on the listed terms.

> For what reason we are not informed, nor is it important for the determination of the issues presented by this case. She had a perfect right to recede from the contract at any time prior to its formal execution, as was provided in the agreement to lease the property, *but the exercise of that privilege was burdened with the responsibility for the compensation earned by the plaintiff, in her service.*

Id. at 285 (emphasis added).

234. The defaulting principal remains liable for payment of the brokerage commission regardless of whether the broker returned the purchaser's deposit after the principal's breach. Wolfe v. Anderson, 242 So. 2d 14 (La. App. 3d Cir. 1970).

(who never promised to pay a commission) default, the broker is unable to sue the party who *did* promise to pay the commission—the customer—and must therefore seek relief via a suit against the defaulting purchaser for damages *measured by* the amount of the lost commission. Since the principal in such cases never expressly promised to pay the commission, such a suit must be based on the principal's *implied* promise to accept a ready, willing, and able customer procured by the broker and to perform the contract.[235] Under the above analysis, the principal's breach of his implied promise to buy or sell is actionable regardless of *who* has promised to pay the contractual commission.

An exception to the rule that the seller is liable for payment of the brokerage commission if he wrongfully refuses to accept a ready, willing, and able prospect or otherwise prevents the consummation of the transaction is found in cases wherein the broker himself consents to or acquiesces in the principal's change of mind.[236] The general rule applies if the principal voluntarily releases the purchaser from his obligation to perform on a contract to sell or if the principal and the customer mutually agree to rescind their agreement. In some cases, the principal may unequivocally reserve his right to refuse to consummate the sale; but Louisiana courts usually find that this was *not* the intent of the parties, that the principal did *not* retain the right to refuse to deal, and thus that the principal will be liable for payment of the commission if he has prevented the consummation of the contemplated transaction.[237]

The principal's nonperformance may be excused, thus relieving him of liability under a brokerage contract, when the nonperformance was caused by a fortuitous event which was *not* the fault of the principal.[238] Still another exception to the general rule, recognized at

235. *See* Comment, *supra* note 231.

236. *See, e.g.*, Erwin v. Yockey, 329 So. 2d 890 (La. App. 2d Cir. 1976) (commission denied on the ground that the broker had acquiesced in the owner's removal of the house from the market); Miller v. Riley, 152 So. 2d 852 (La. App. 4th Cir. 1963) (commission denied to the broker where the vendor, with the knowledge, concurrence, and assistance of the realtor, released the purchaser from his contract to sell).

237. *See* Neal v. Murff, 133 So. 418 (La. App. 2d Cir. 1931). *But see* Westinghouse Credit Corp. v. Cassano, 291 So. 2d 493 (La. App. 4th Cir. 1974). In *Cassano* the owner expressly and unequivocally reserved the right to approve each sale. Some sales he disapproved for no other reason than that they were cash sales, whereas he desired credit purchasers so as to earn interest. The court upheld his right to refuse cash purchasers (although otherwise ready, willing, and able customers) under the rationale that this was not an arbitrary and capricious refusal to sell.

238. LA. CIV. CODE art. 2209: "When the . . . substance, which was the object of the obligation, is destroyed, is rendered unsalable, or is lost so that it is absolutely known not to exist the obligation is extinguished. . . ." *See* Williams v. Bel, 339 So. 2d 748 (La. 1976) (flood-damaged property was rendered unsalable; thus, no commission earned).

common law, may be found in cases wherein the principal's nonperformance is legally excused on the grounds of incapacity,[239] or when the principal's refusal to perform is justified by acts of fraud, misrepresentation or other misconduct on the part of the customer.[240] Where the vendor and vendee are *both* at fault, *both* share equal responsibility for payment of the brokerage commission.[241]

Defects in the Title of the Principal

Although a principal may be liable for payment of a brokerage commission when a defect in his title prevents consummation of the transaction, nevertheless, it appears that the principal's inability to perform on these grounds is not viewed technically as "fault" on his part.[242] In the absence of a contractual provision to the contrary, the broker is entitled to his commissions if, acting in good faith, he procures a customer willing, able, and ready to take the property upon the terms offered by the principal, although the contract is rescinded or the sale otherwise fails because of a defect in the principal's title of which the broker had no notice.[243] The rationale for this rule is

239. *See* Smith v. Blum, 143 So. 2d 419 (La. App. 4th Cir. 1962). In *Smith v. Blum*, the vendor, refusing to perform, defended the broker's suit for commission on the basis of his alleged contractual incapacity (*i.e.*, incompetency). However, the court held the principal liable for the commission, finding that the alleged indications of senility were not apparent to the broker at the time of the execution of the contract to sell and that any incapacity of the principal was not known to the broker at the relevant times; ergo the contract to sell was valid and, since the principal had refused to perform, he was liable for payment of the brokerage commission.

240. *See* Annot., *Broker's Right to Commission on Sale Rejected by Principal Because of Buyer's Fraud or Misrepresentation*, 79 A.L.R.2d 1055 (1961).

241. Treigle v. Patrick, 138 So. 2d 652 (La. App. 4th Cir. 1962).

242. *See* Annot., *Failure of Title as Fault or Default of Owner Within Exception in Contractual Provision Denying Broker's Right to Commissions if Sale is Not Closed*, 56 A.L.R. 913 (1928).

243. Castellon v. Nations, 230 So. 2d 675 (La. App. 4th Cir. 1970) (principal's title was defective; therefore he was liable for payment of the brokerage commission); Strahan v. Weiland, 216 So. 2d 169 (La. App. 1st Cir. 1968) (the principal-seller had minor children who owned a one-half undivided interest in the property, and their undertutor refused to consent to the sale, which was therefore not consummated. Finding that the broker had no actual knowledge of the fact that the principal did not have clear title, the court held the principal liable for payment of the commission); Schroeder v. Krushevski, 186 So. 2d 640 (La. App. 4th Cir. 1966) (conditional contract to sell became unconditional when the savings and loan association approved a loan for the purchaser. The sale was not consummated due to a defect in the principal's title; the principal was held liable for payment of the brokerage commission); Walker v. Moore, 68 So. 2d 222, 222 (La. App. 2d Cir. 1953) (ignoring express contractual language that stipulated, "when the deed is signed, I will . . . pay [the commission,]" the court held the principal liable for the brokerage fee where the sale was not consummated due to a defect in the principal's title); Cotter v. Figaro, 36 So. 2d 291 (La. App. 1st Cir. 1948) (principal's title defect resulted in non-consummation of the sale; principal was held liable for payment of the commission).

that, in the absence of notice to the contrary, a broker has a right to rely on the assumption that his principal's title is valid and marketable.[244]

Extensive jurisprudence treats the issue of *what* defects in a principal's title will render him liable for payment of a brokerage commission. The widely recognized rule is that if a principal's title is marketable at the moment of the execution of a contract to sell (*i.e.*, purchase agreement) and only subsequently becomes unmarketable through no fault of the principal, the principal will *not* be liable for payment of a commission.[245] A principal's defective title, to render him liable for a brokerage commission despite non-consummation of the intended transaction, must be serious enough to render the title "unmerchantable" by legal standards.[246]

The jurisprudence, in other words, does not require that the principal's title be perfect.[247] Defective, unmerchantable titles have been held to include those clouded by adverse tax titles,[248] encroachments,[249] outstanding encumbrances,[250] adverse mineral interests,[251] competitive co-ownership or community interests,[252] potential legitime disputes (*i.e.*, all ownership obtained through donations

244. Cox v. Green, 70 So. 2d 724 (La. App. 2d Cir. 1954).

245. *See, e.g.*, Dutel v. Bitterwolf, 166 So. 2d 526 (La. App. 4th Cir. 1964); Cabral v. Barkerding, 50 So. 2d 516 (La. App. Orl. Cir. 1951); Neal v. Halliburton, 19 So. 2d 625 (La. App. 2d Cir. 1944).

246. Spiro v. Corpora, 174 So. 145 (La. App. Orl. Cir. 1937). Generally, the opinion of a competent attorney as to whether or not a given title is "marketable" will be correct. *But see* Clesi, Inc. v. Quaglino, 137 So. 2d 500 (La. App. 4th Cir. 1962) (court stated that the approval or disapproval of a title by an attorney or lending agency does not, in itself, render the title conclusively merchantable or unmerchantable. This is an issue for the court to determine. Since no court should entertain testimony by expert witnesses on issues of domestic law, no expert witness may testify as to the merchantability *vel non* of the principal's title. The court held the principal liable for payment of the commission, despite the fact that his attorney opined his title to be good).

247. *See* Ibeck v. Wise-Miller, 174 La. 1012, 142 So. 155 (1932) ("merchantable" does not connote a "perfect" title. Court held that the principal's title was merchantable, despite the fact that it contained minor, correctable defects; principal held not liable for payment of the commission); Spiro v. Corpora, 174 So. 145 (La. App. Orl. Cir. 1937) (purchaser refused to accept property the ownership of which was listed in the wife's name. The court held that this situation alone, in the absence of evidence that the husband intended to refuse his consent to the sale, did not render the wife's title unmerchantable).

248. *See, e.g.*, Pierre v. Chevalier, 233 So. 2d 61 (La. App. 4th Cir. 1970).

249. *See* Pierre v. Chevalier, 233 So. 2d 61 (La. App. 4th Cir. 1970).

250. *See* Webb v. Gee, 128 So. 2d 449 (La. App. 4th Cir. 1961) (by implication).

251. *See, e.g.*, Treadaway v. Amundson, 88 So. 2d 67 (La. App. Orl. Cir. 1956).

252. *See, e.g.*, Matthews Bros. v. Bernius, 169 La. 1069, 126 So. 556 (1930) (principal could not perform because the subject property was community property, and the principal's spouse refused to consent to the sale; principal held liable for payment of the commission).

are *per se* unmerchantable),[253] and outstanding leases.[254] It is immaterial that the contemplated transaction is an exchange rather than a sale; the principal will be held liable for a commission in either case if his title is defective.[255]

There are at least five general exceptions to the rule that a principal may be liable for a commission where non-consummation is due to a defect in his title.

First, although the broker generally has the right to rely on the assumption that the principal's title is valid and marketable, if the broker has *actual* knowledge or notice of the defect in the principal's title, his right to a commission will be denied.[256] At common law, a broker's awareness of the fact that the owner is only a joint or partial owner in the subject property or that the signature of a spouse, partner, or corporation will be required in order to sell the property does not constitute actual knowledge of a defective title unless the broker also had notice that the co-owner, spouse, or partner did not intend to consent.[257] In Louisiana, however, if the broker knows that the principal does not have a complete title, but is merely a co-

253. *See* LA. CIV. CODE arts. 1504 & 1515; Cox v. Green 70 So. 2d 724 (La. App. 1st Cir. 1954) (consummation prevented because the principal obtained her title through a donation and therefore her title was defective; principal held liable for payment of the commission).

254. *See, e.g.*, Stoer v. Pearson, 5 La. App. 609 (1st Cir. 1927).

255. One earlier case used overbroad dicta which implied that if *either* the exchangor's title *or* the exchangee's title was invalid, no commission would be due. Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932). In *Boisseau*, the court denied recovery of a commission under circumstances where a contemplated exchange could not be consummated because of a defect in the *customer's* title. However, the court (erroneously) rationalized, "[the principal] most assuredly, if he were sane, . . . did not intend to pay the commissions if the title to *either his lots or the property [of the customer] was defective*. . . ." (Emphasis added). 174 La. at 501, 141 So. at 41. A significant later case, however, has questioned and clarified that dicta. *See* Guy L. Deano, Inc. v. Michel, 181 So. 551 (La. App. Orl. Cir.), *annulled on other grounds*, 191 La. 233, 185 So. 9 (1938):

> We cannot but feel that the reference [in *Boisseau*] to "his lots" was inadvertently placed in the opinion. If that statement was intentionally and deliberately made, then the effect of the decision would be to overrule the long line of cases which have firmly established the doctrine that "when the broker produces a purchaser he is entitled to his commission although a sale is not consummated because of the inability of the vendor to comply with his offer . . . . [W]e see no reason why . . . either party should not be liable [for a commission if] the transaction fails because of a defect in [the principal's] own title, and we respectfully conclude that that is all the Supreme Court intended to say in the *Boisseau* case.

181 So. at 554.

256. Caruso-Goll v. D'Alfonso, 1 So. 2d 120 (La. App. Orl. Cir. 1941).

257. *See* Annot., *Kowledge, Actual or Imputable, of Default or Condition Preventing Consummation of Sale as Affecting Real-estate Broker's Rights to Commissions*, 156 A.L.R. 1398 (1945).

owner in indivision of property, the right to a commission will be denied.[258]

Although the courts require evidence that the broker had *actual* knowledge or notice, as opposed to *constructive* knowledge or notice,[259] the broker's claim can be barred as a result of *imputed* knowledge when the broker has actual notice of facts that would signal the presence of a title defect to the average, reasonably prudent person.[260]

Second, if the contract to sell is only a *conditional* one, and the condition is never fulfilled to create a binding contract, a brokerage commission is not earned, regardless of the status of the principal's title.[261]

Third, Louisiana courts will not hold a principal liable for payment of a brokerage commission—regardless of a defect in the prin-

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258. Werner, McShan & Robertson, Inc. v. Bonnette, 160 So. 2d 334 (La. App. 4th Cir. 1964) (broker had actual notice that the principal had only a co-ownership interest in the property; commission denied). *See* Farrier v. Guillory, 342 So. 2d 1167 (La. App. 1st Cir. 1977). In *Farrier* the court granted recovery of a commission to a broker despite the fact that the broker knew that the owners might not have title in themselves, but where the broker reasonably believed that they either were or soon would be the legal owners of the property. Anticipatory conveyances are valid in Louisiana. Friedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So. 2d 144 (1953).

259. *See* Cox v. Green, 70 So. 2d 724 (La. App. 1st Cir. 1954) (broker is not required to investigate the records of the conveyance office).

260. *See* Cox v. Green, 70 So. 2d 724 (La. App. 1st Cir. 1954). *Cox* contains dicta indicating that if a broker has actual knowledge that the principal has only a life estate in the property, the court will impute to the broker an understanding of the legal significance of the fact that the principal did not have a fee interest. Similarly, Louisiana brokers are presumed to be aware of the legal disabilities associated with co-ownership of property. Werner, McShan & Robertson, Inc. v. Bonnette, 160 So. 2d 334 (La. App. 4th Cir. 1964). However, Louisiana brokers are *not* charged with the knowledge of the legal effects of a donation under Civil Code articles 1504 and 1505. Cox v. Green, 70 So. 2d 724 (La. App. 1st Cir. 1954). Thus, the mere fact that a broker has been told that the principal obtained his property by donation is not sufficient to defeat the broker's claim for a commission when the sale is not consummated as a result of the defective title. "The [broker] under the jurisprudence [is] not . . . required to investigate the records of the conveyance office, [and is] equally relieved of any legal obligation or duty to employ an attorney for the purpose of giving him a legal opinion as to defendant's title or specifically as to the status of a donation." *Id.* at 727.

261. Jacobs v. Grasshoff, 120 So. 417 (La. App. Orl. Cir. 1929) (a binding contract is required to vest the broker's right to a commission; thus, when the contract to sell was conditional, no commission is due regardless of the defect in the principal's title). *See* Schroeder v. Krushevski, 186 So. 2d 640 (La. App. 4th Cir. 1966) (after a conditional contract to sell has been made binding by the fulfillment of the condition, if non-consummation is caused by a defect in the principal's title, the principal is liable for payment of a commission).

cipal's title—if the purchaser never required or demanded that the principal perform.[262]

Fourth, the general rule (*i.e.*, that a principal may be held liable for payment of a brokerage commission if non-consummation of the contemplated transaction is the result of a defect in the principal's title) is applied only in the absence of express contractual language to the contrary.[263] Many modern purchase agreements used by brokers provide that the seller's inability to deliver a merchantable title within the time stipulated shall render the contract null and void.[264]

Finally, the principal may be relieved from liability for payment of a brokerage commission in cases wherein the broker violated his overriding fiduciary duty of good faith toward the principal. There is one significant Louisiana case in which the court, by engaging in a tortuous construction of a brokerage agreement, relieved a principal who had a defective title of liability for a brokerage commission because the broker had acted in bad faith toward his principal.[265]

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262. Wells v. Spears, 255 So. 2d 215 (La. App. 1st Cir. 1971). In *Wells* the purchase agreement provided that the principal had 30 days to correct any defects in his title, but the purchaser never notified the principal that his title contained any defects. The court held the principal not liable for payment of the commission. It is submitted that the outcome of this case is questionable, since the broker was denied any commission at all, in spite of the fact that one of the parties was clearly at fault. The principal in this case could have demanded performance on the part of the purchaser, together with a 30-day extension to correct any defects in his title. This he did not do. If the purchaser refused to demand conveyance of a marketable title, then the purchaser would be in (passive) default and could be held liable for payment of the commission. However, as was probably the case, if the purchaser stood ready to purchase a marketable title from the principal, but the principal was unable to convey one, then the principal should be liable for the commission. In neither case should the broker have been denied his commission. *But see* Leaman v. Rauschkolb, 199 So. 663 (La. App. Orl. Cir. 1941). The purchaser in *Leaman* refused to consummate the sale because his attorney told him that the seller-principal's title was defective, and the principal-seller insisted that his title was good, yet never sued the buyer for specific performance (never *tendered* a good title); the court held that it would presume that the principal's title was defective and found the principal liable for payment of the commission.

263. *See* Kuhn v. Stan A. Plauche Real Estate Co., 249 La. 85, 185 So. 2d 210 (1966); Note, *Contracts-Broker's Commission*, 13 LOY. L. REV. 159 (1967).

264. *See, e.g.*, Johnston v. Cole, 163 La. 885, 113 So. 135 (1927). The *Johnston* court held that the general rules regarding defective titles of principals did not apply in light of the special contractual provision in the principal's listing agreement that the broker was entitled to no commission unless a sale was consummated and the purchase price paid in full.

265. Oldham v. Jones, 136 So. 2d 310 (La. App. 2d Cir. 1961). The *Oldham* majority upheld the following express contractual language found in the purchase agree-

ment: "In the event Title cannot be made valid and merchantable within 60 days from date, the money receipted for shall be returned and buyer and seller will be relieved of *any* obligation under this contract." *Id.* at 311 (emphasis added). The court stated: "[T]itle was not perfected . . . within the [time] . . . provided for . . . Under these circumstances, the contract came to an end and both parties were released from any obligations thereunder by its very terms." *Id.* at 312.