

**CASE NOTE: PROCURING A DIFFERENT CAUSE: THE
RETURN OF THE PROCURING CAUSE DOCTRINE AS
APPLIED TO MINNESOTA REAL ESTATE COMMISSION
DISPUTES IN *ROSENBERG V. HERITAGE RENOVATIONS,
LLC***

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I. INTRODUCTION

In *Rosenberg v. Heritage Renovations, LLC*, the Minnesota Supreme Court addressed the issue of whether Minnesota Statutes section 82.21, subdivision 2 displaces the common law procuring cause doctrine in disputes over real estate broker commissions.¹ In spite of recent precedent asserting the statute's abrogation of the common law,² the supreme court in *Rosenberg* held that Minnesota real estate brokers can rely on the procuring cause doctrine as an alternative remedy in cases involving commission disputes.³

This note first examines some useful history and terminology regarding real estate commission disputes, the procuring cause doctrine, and Minnesota Statutes section 82.21.⁴ It follows with a summary of the facts of the *Rosenberg* decision and the Minnesota Court of Appeals' and Minnesota Supreme Court's analysis of the case.⁵ This note then analyzes the supreme court's decision to apply the procuring cause doctrine in *Rosenberg*,⁶ and concludes with a plea to the Minnesota legislature to clarify that the effect of the statute is to abrogate that doctrine.⁷

II. HISTORY AND TERMINOLOGY

A. *Brokers, Listing Agreements, and Commission Disputes*

1. *Brokers and Listing Agreements*

Minnesota law defines a real estate broker as a person who "for another and for *commission*, fee, or other valuable consideration . . . lists, sells, exchanges, buys or rents, manages, or offers or attempts

1. See *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320 (Minn. 2004) [hereinafter *Rosenberg II*].

2. See *Douglas v. Schuette*, 607 N.W.2d 142 (Minn. Ct. App. 2000).

3. *Rosenberg II*, 685 N.W.2d at 326-30.

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Part V.

to negotiate a sale . . . purchase or rental of an interest or estate in real estate.”⁸ Because of the complexities involved in many real estate transactions, the involvement of a broker is often crucial.⁹ In a typical real estate sale, the broker commonly handles many aspects of the selling process such as setting the correct price, developing a marketing plan to attract potential buyers, negotiating the eventual sale, and performing some, or all, of the final closing duties.¹⁰ Real estate brokers enter into contracts with their clients

8. MINN. STAT. § 82.17, subd. 18(a) (2004) (emphasis added). Minnesota Statutes section 82.17 recognizes various other ways in which a person can be considered a broker including, for example, advertising as a broker, securing loans in connection with mortgages, and selling business-related property. *Id.* § 82.17, subd. 18(a), (b), (d)-(f). In contrast, the statute distinguishes a “real estate salesperson” as “one who acts on behalf of a real estate broker in performing any act authorized . . . to be performed by the broker.” *Id.* § 82.17, subd. 19.

9. See NATIONAL ASSOCIATION OF REALTORS, THE 2003 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS: MINNESOTA STATE REPORT 2, available at <http://www.mnrealtor.com/publications/surveys.html>. In promoting the importance of hiring a real estate broker, the National Association of Realtors states,

In today’s market, many people mistakenly believe that selling a house is uncomplicated and effortless. However, selling one’s home can often be even more daunting than buying a home. Establishing a competitive list price, deciding how to market a home, and timing the sale to coincide with a purchase of another home are all challenging but important undertakings that the home seller must manage.

Real estate professionals specialize in assisting buyers and sellers with these tasks and are knowledgeable in all aspects of the home sales transaction. They have the experience and expertise to coordinate all parts of the sales transaction for both buyers and sellers. It is therefore no surprise that the majority of home sales involve a real estate professional in some capacity.

Real estate professionals know their neighborhoods better than anyone. With this knowledge, they help their clients find properties that meet the needs of first-time buyers, married couples with children, or empty-nesters looking to downsize. Additionally, they also assist sellers in pricing, marketing and selling their homes in a timely manner.

Id.

10. See MoneySense.ca, *What a REALTOR Can Do for You That You Can’t Do for Yourself*, at http://www.moneysense.ca/spending/home_mortgage/article.jsp?content=20030429_135512_4576 (last visited Feb. 10, 2005). According to a recent survey conducted by the Minnesota Association of Realtors, “the most important tasks that sellers wanted their agent to perform were help selling the house within the seller’s time frame (26 percent), help pricing the home competitively (25 percent) and help finding a buyer (19 percent).” MINNESOTA ASSOCIATION OF REALTORS, *Real Estate Industry Scan: Trends, Industry Practice, Innovation & Change* 10, available at <http://www.mnrealtor.com/publications/pdfs/Industry04.pdf> (last visited Feb. 10, 2005) [hereinafter *Real Estate Industry Scan*].

through written listing agreements.¹¹

A listing agreement is “an agreement between a property owner and [a broker], whereby the [broker] agrees to try to secure a buyer . . . for a specific property at a certain price and terms in return for a fee or commission.”¹² A typical listing agreement includes, at minimum, the names of the parties to the contract, a description of the property for sale, the sales price and terms of payment, the amount of compensation, and a termination date.¹³ Generally, by entering into a listing agreement with a property owner, a real estate broker agrees to find a buyer who is ready, willing, and able to purchase the owner’s property at the price specified in the contract and under any other terms contained in the agreement.¹⁴ In practice, however, a broker’s commission is earned only when the broker “has performed all that he undertook to perform” according to the listing agreement.¹⁵ This performance is specifically defined by the exact terms negotiated

11. “In more than half the states, particular provisions of the statute of frauds or of state licensing or administrative rules or regulations . . . either require a broker’s employment contract to be in writing or require a written agreement in order to collect a commission.” 15 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 84C.03[3] (Michael Allen Wolf ed., 2004). Although there is no explicit statute of frauds requirement for listing agreements in Minnesota, “all listing agreements must be in writing . . .” MINN. STAT. § 82.21, subd. 2(b) (2004). In addition, Minnesota Statutes address the subject, stating, “No person required by this chapter to be licensed shall be entitled to or may bring or maintain any action in the courts for any commission, fee or other compensation with respect to . . . real property unless there is a written agreement with the person required to be licensed.” MINN. STAT. § 82.18, subd. 2.

12. BLACK’S LAW DICTIONARY 943 (7th ed. 1999). Most commonly, a listing agreement in Minnesota is an “exclusive right to sell agreement,” under which the broker receives a commission regardless of whether the broker actually makes the sale. EILEEN ROBERTS, *MINNESOTA PRACTICE SERIES: REAL ESTATE LAW* § 1.10 (2004). Two other less common types of listing agreements are the “open listing agreement” and the “net listing agreement.” In an open listing agreement, or nonexclusive listing agreement, any broker who finds a buyer for the property owner is entitled to a commission. *Id.* In a net listing agreement, the broker’s commission is only “the amount . . . by which the actual purchase price for the listed property exceeds the price that the seller specified in the listing agreement.” *Id.*

13. POWELL, *supra* note 11, § 84C.03[2][a].

14. *Lohman v. Edgewater Holding Co.*, 227 Minn. 40, 44, 33 N.W.2d 842, 844-45 (1948) (“In the absence of a contrary agreement a broker to sell realty is entitled to his commission when he produces a purchaser ready, willing, and able, to purchase the property . . .”); *see also* John M. Norwood & Cornelius J. Hyde, *Extension Clauses in Louisiana Listing Agreements*, 42 LA. L. REV. 1011, 1011 (1982).

15. *Rosenberg II*, 685 N.W.2d at 327 (quoting *Greer v. Kooiker*, 312 Minn. 499, 510, 253 N.W.2d 133, 141 (1977)).

between the broker and the seller.¹⁶ The concept is relatively simple: if the broker delivers a buyer to the property owner according to the terms specified in the listing agreement, the broker is entitled to a commission. However, this seemingly simple concept does not always produce the desired results. Because the typical commission paid to the seller's broker in a real estate transaction can range anywhere from five to seven percent of the sales price of the property,¹⁷ brokers can earn, and sellers can pay, large amounts of money for commissions.¹⁸ As a result, commission disputes are not uncommon.

2. *Commission Disputes*

Disputes between real estate brokers and sellers regarding whether a commission has been earned can take various forms and arise for any number of reasons. In one situation, multiple brokers are involved in a sale and more than one of those brokers claim to be responsible for that sale.¹⁹ A second type of problem occurs upon the prospective sale of property to a buyer, which later fails to close for any number of reasons.²⁰

16. *Id.* (citing *Olson v. Penkert*, 252 Minn. 334, 342, 90 N.W.2d 193, 200 (1958)).

17. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 49 (4th ed. 2003). In response to antitrust price fixing allegations by the U.S. Supreme Court, listing agreement forms currently "invite sellers to negotiate the amount of the commission" by leaving the exact amount of the commission out of blank forms. *Id.* at 50.

18. For example, according to a recent survey by the Minnesota Association of Realtors, "[t]he typical home seller [in 2003] sold their home for \$190,000 and then purchased a home for \$195,000." *Real Estate Industry Scan*, *supra* note 10, at 10. Assuming an average commission of six percent and a home selling for \$190,000, the real estate broker who both lists and sells a typical Minnesota home would earn a commission of \$11,400.

19. WERNER & KRATOVIL, REAL ESTATE LAW 111-12 (10th ed. 1993).

When several brokers are involved . . . [i]f the first broker's efforts result in a disagreement or if negotiations are abandoned, and thereafter a second broker steps in and brings the parties together, the second broker is the procuring cause of the sale. But if the first broker brings about a substantial agreement and the second broker merely works out details of the transaction, the first broker is the procuring cause of the sale.

Id. See, e.g., *Rees-Thomson-Scroggins, Inc. v. Nelson*, 276 Minn. 453, 150 N.W.2d 568 (1967); *Neumeier v. Sperzel*, 223 Minn. 60, 25 N.W.2d 651 (1946); *Dorgeloh v. Mark*, 183 Minn. 265, 236 N.W. 325 (1931).

20. POWELL, *supra* note 11, § 84C.04[1] ("Where the broker has found a ready, willing and able buyer, the seller generally cannot defeat the broker's right to a commission by failing to consummate the transaction, for example, by refusing to convey, or by being unable to convey because of lack of clear title.").

Although both of the above types of commission disputes have produced interesting and important case law, this note focuses specifically on post-termination commission disputes. These disputes generally involve the sale of property by the owner or through a second broker after the termination or expiration of the original listing agreement.²¹ To resolve commission disputes, Minnesota courts have applied the procuring cause doctrine.

B. The Procuring Cause Doctrine

1. The Doctrine in General

Under the procuring cause doctrine, a broker is entitled to a commission if that broker's efforts are "the efficient cause, but not necessarily the sole cause of a series of unbroken, continuous events, which culminate in the accomplishment of the objective of the employment."²² This equitable doctrine is based on the common law doctrine of quantum meruit²³ in that it allows the real estate broker to prove that the seller has obtained the benefit of the broker's services, typically in the form of a sale of property, without paying for those services.²⁴ To succeed under the procuring cause doctrine, the broker must provide evidence "that [the broker] originated a course of events which without a break in their continuity created a cause of which the sale was the result."²⁵ The broker must prove that his efforts did more than just

See, e.g., Lake Co. v. Molan, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964).

21. Steven K. Mulliken, *When Does the Seller Owe the Broker a Commission? A Discussion of the Law and What It Teaches about Listing Agreements*, 132 MIL. L. REV. 265, 280 (1991). *See, e.g.,* Rosenberg II, 685 N.W.2d 320 (Minn. 2004); Spring Co. v. Holle, 248 Minn. 51, 78 N.W.2d 315 (1956); Douglas v. Schuette, 607 N.W.2d 142 (Minn. Ct. App. 2000); Realty House, Inc. v. Grimm 460 N.W.2d 917 (Minn. Ct. App. 1990); Lynn Beechler Realty Co. v. Warnygora, 396 N.W.2d 717 (Minn. Ct. App. 1986).

22. 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:19 (4th ed. 1990). The procuring cause doctrine is commonly used by the broker to "show that his or her part of the contract was performed," or as a defense by the property owner to prevent fraud on the part of the broker. 12 AM. JUR. 2D *Brokers* § 236 (2004).

23. Norwood & Hyde, *supra* note 14, at 1013. Quantum meruit is "the reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship." BLACK'S LAW DICTIONARY, *supra* note 12, at 1255.

24. Norwood & Hyde, *supra* note 14, at 1011.

25. Rosenberg II, 685 N.W.2d at 328 (quoting Spring Co. v. Holle, 248 Minn. 51, 56, 78 N.W.2d 315, 318 (1956)).

“contribute to the result,” but were the means that actually produced the sale.²⁶ Accordingly, the question of who was the procuring cause of a sale varies with the particular facts and circumstances of each case.²⁷ The procuring cause doctrine has been applied by Minnesota courts in situations involving brokerage commission disputes for more than a century.²⁸

2. *The Procuring Cause Doctrine in Minnesota Courts*

The procuring cause doctrine was first applied by the Minnesota Supreme Court in an 1882 dispute over real estate broker commissions in *Armstrong v. Wann*.²⁹ In deciding whether the eventual purchaser had been procured by the broker in *Armstrong*, the court set out the procuring cause doctrine:

All that plaintiff had to do to be entitled to his commissions was to procure a purchaser ready and willing to buy upon his employer's terms. If he did so it would make no difference that the employer made the bargain with the purchaser. Plaintiff, however, must have been the procuring cause of the sale. It must have been the result of the means and efforts employed by him; must have proceeded from these means and efforts.³⁰

26. *Id.*

27. 12 AM. JUR. 2D *Brokers* § 237 (2004).

28. See *Rosenberg II*, 685 N.W.2d at 327 n.6 (noting that Minnesota has recognized the procuring cause doctrine for “several decades” and citing *Wright v. M.B. Hagen Realty Co.*, 269 N.W.2d 62, 66 (Minn. 1978); *Stead v. Erickson*, 182 Minn. 469, 471, 234 N.W. 678, 679 (1931); *Armstrong v. Wann*, 29 Minn. 126, 127, 12 N.W. 345, 346 (1882)).

29. 29 Minn. 126, 12 N.W. 345 (1882).

30. *Id.* at 127-28, 12 N.W. at 346 (citing *Murray v. Currie*, 7 Carr. & P. 584 (1836); *Wilkinson v. Martin*, 8 Carr. & P. 5 (1837); *Hungerford v. Hicks*, 39 Conn. 259 (1872); *Gillespie v. Wilder*, 99 Mass. 170 (1868); *Tombs v. Alexander*, 101 Mass. 255 (1869); *Earp v. Cummings*, 54 Pa. St. 394 (1867); *Lyon v. Mitchell*, 36 N.Y. 235 (1867); *McClave v. Paine*, 49 N.Y. 561 (1872); *Lloyd v. Matthews*, 51 N.Y. 124 (1872); *Chandler v. Sutton*, 5 Daily 112; *Wylie v. Mar. Nat. Bank*, 61 N.Y. 415 (1875). The specific dispute in *Armstrong* involved the seller's direct sale to a buyer who had originally contemplated purchasing property jointly with a second buyer through the original broker. *Armstrong*, 29 Minn. at 126-27, 12 N.W. at 346. Applying the procuring cause doctrine, the court reasoned:

As plaintiff made no bargain with King, and did not, in the negotiation he had with him and Keigher, bring him to consent to buy, and was not, during the four months after that negotiation ended, carrying on any negotiations with him, nor using any efforts with him to induce him to buy, he was not the procuring cause of the sale, unless it can be assumed that because of what occurred in the unsuccessful negotiation, King made defendant the offer which was accepted. This cannot be assumed;

Since *Armstrong*, the procuring cause doctrine has been applied numerous times by Minnesota courts in cases involving real estate commissions.³¹ One case particularly relevant to disputes involving post-termination commissions is *Spring Co. v. Holle*.³² In *Spring Co.*, the plaintiff/broker entered into an exclusive listing agreement to sell the defendant/seller's home in exchange for a five percent commission.³³ After showing the house to several potential purchasers, the broker presented two offers to the seller on behalf of a purchaser, both of which were rejected.³⁴

After the listing agreement expired, however, the seller executed a separate agreement to sell the property to the same purchaser.³⁵ The court described the situation as follows:

In October of 1953, without plaintiff's knowledge, [the seller] communicated directly with [the purchaser] with respect to purchasing the property and persuaded him to look at it again. This time [the seller] offered it for \$35,000, and [the purchaser] quickly indicated his desire to purchase the property at that figure. An unusual sales procedure was then adopted, which the trial court found was resorted to because of [the seller's] belief that most listing contracts had provisions protecting the agents therein on their commissions for six months after the expiration date thereof.³⁶

After hearing of the agreement, the broker demanded commissions on the sale.³⁷

Applying the procuring cause doctrine in *Spring Co.*, the Minnesota Supreme Court held that, as a result of his efforts to sell the property and the offers presented to the seller, as well as the apparent collusion between the seller and the buyer to deprive the plaintiff of a commission, there was "ample evidence to sustain a finding that [the broker] was the procuring cause of the sale."³⁸

it is not indicated by the evidence. The fair inference is that after the failure of that negotiation, King, either from something subsequently occurring or from something occurring between him and defendant, concluded to buy.

Id. at 128, 12 N.W. at 346.

31. See, e.g., *supra* notes 18-21 and accompanying text.

32. 248 Minn. 51, 78 N.W.2d 315 (1956).

33. *Id.* at 53, 78 N.W.2d at 317.

34. *Id.* at 53-54, 78 N.W.2d at 317.

35. *Id.* at 54, 78 N.W.2d at 317.

36. *Id.* at 54, 78 N.W.2d at 317-18.

37. *Id.* at 55, 78 N.W.2d at 318.

38. *Id.* at 56, 78 N.W.2d at 319.

To help avoid disputes regarding the payment of commissions after the expiration of a listing agreement, real estate brokers commonly include contractual provisions dictating the specific events that will lead to a commission in the event that a sale is consummated after the original listing agreement is terminated or expires.³⁹

C. Override Clauses, Protective Lists, and Chapter 82 of Minnesota Statutes

1. Override Clauses and Protective Lists

To provide greater protection from potential conflicts involving the payment of commissions, many listing agreements contain override clauses.⁴⁰ Minnesota law defines an override clause as “a provision in a listing agreement or similar instrument allowing the broker to receive compensation when, after the listing agreement has expired, the property is sold to persons with whom a broker or salesperson had negotiated or exhibited the property prior to the expiration of the listing agreement.”⁴¹ One reason for this type of provision is to protect the broker from a seller who refuses to accept an offer during the time period stated in the listing agreement, “only to accept a similar offer from the same buyer shortly after the period has expired.”⁴² Additionally, an override clause protects the seller by ensuring that “the broker will work hard to sell the property before the listing agreement expired.”⁴³

Property owners and brokers can also provide more security and avoid litigation by requiring a protective list along with an override clause. “A *protective list* is a written list of names and addresses of prospective purchasers with whom the broker negotiated the sale or rental of the property or to whom the broker exhibited the property before the listing agreement expires.”⁴⁴ A typical override clause containing a protective list requirement

39. See *infra* Part II.C.1.

40. ROBERTS, *supra* note 12, § 1.12. Override clauses are also commonly referred to as extensions clauses. See Norwood & Hyde, *supra* note 14, at 1011.

41. MINN. STAT. § 82.17, subd. 12 (2004).

42. Norwood & Hyde, *supra* note 14, at 1011; see ROBERTS, *supra* note 12, § 1.12.

43. ROBERTS, *supra* note 12, § 1.12.

44. *Id.* (citing MINN. STAT. § 82.17, subd. 15 (2004)).

might read:

If within 180 days after the end of this contract [Seller] sell[s] or agree[s] to sell the property to anyone who: (1) During this contract made inquiry of [Broker] about the property and [Seller] did not tell [Broker] about the inquiry; or (2) During this contract made an alternative showing of interest in the property or was physically shown the property by [Broker] and whose name is on a written list [given to Seller by Broker] within 72 hours after the end of this contract, then [Seller] will pay [Broker] a commission on the selling price, even if [Seller] sells the property without [Broker's] assistance.⁴⁵

Both override clauses and protective lists are addressed by Minnesota law governing real estate brokers.

2. *Chapter 82 of Minnesota Statutes*

Chapter 82 of Minnesota Statutes regulates real estate brokers and salespersons and addresses such topics as compensation, contracts, disclosure requirements, and licensing.⁴⁶ Additionally, Chapter 82 delegates authority to the commissioner of commerce to promulgate additional rules necessary for carrying out the statutory provisions.⁴⁷ In 1982, in response to questions regarding the required contents of a listing agreement,⁴⁸ the Commerce Department created a rule specifying the elements of a listing agreement in Minnesota.⁴⁹ Originally, the requirements were set out in Minnesota Rules 2800.3800, which was later renumbered Rules 2805.1200.⁵⁰ The legislature codified the rule in Statutes section 82.195 in 1993.⁵¹ Chapter 82 was subsequently renumbered in 2004, and the listing agreement requirements are currently located in Minnesota Statutes section 82.21, subdivision 2.⁵² For clarity, although many of the cases discussed in this note predate

45. *Douglas v. Schuette*, 607 N.W.2d 142, 145-46 (Minn. 2000).

46. *See* MINN. STAT. ch. 82 (2004).

47. *Id.* § 82.47.

48. *See* *Rueben v. Gibbs*, 297 Minn. 321, 323, 210 N.W.2d 857, 858 (1973) ("It will be noted that the statute is part of Chapter 82, dealing with the regulation of real estate brokers. Nowhere in the chapter is a listing agreement defined. Common sense would indicate that a listing agreement contain at least an authorization to sell.").

49. ROBERTS, *supra* note 12, § 1.11.

50. *See* ROBERTS, *supra* note 12, § 1.11 n.9.

51. *See* ROBERTS, *supra* note 12, § 1.11.

52. *See* MINN. STAT. § 82.21, subd. 2(b) (2004).

the codification of the listing agreement rule or the renumbering of Minnesota's real estate statute, this note will refer exclusively to Chapter 82 of Minnesota Statutes as renumbered in 2004.

Minnesota Statutes section 82.21, subdivision 2 requires that a listing agreement include certain elements.⁵³ Several of these elements directly address override clauses and protective lists. Section 82.21 subdivision 2(b)(6) requires that all listing agreements include:

[I]nformation regarding an override clause, *if applicable*, including a statement to the effect that the override clause will not be effective unless the [broker] supplies the seller with a protective list within 72 hours after the expiration of the listing agreement.⁵⁴

Further, subdivision 2(e) of section 82.21 adds explicit requirements regarding the use of protective lists:

A broker or salesperson has the burden of demonstrating that each person on the protective list has, during the period of the listing agreement, either made an affirmative showing of interest in the property by responding to an advertisement or by contacting the broker or salesperson involved or has been physically shown the property by the broker or salesperson.⁵⁵

Although the language of the statute seems relatively benign, there has been recent controversy with regard to whether the use of an override clause and protective list is required for a broker to receive post-termination commissions under Minnesota law, and further, whether the requirements of section 82.21 were intended to abrogate the procuring cause doctrine.⁵⁶ Before addressing the

53. *Id.* § 82.21, subd. 2(b)(1)-(10). The specific listing agreement elements required by the statute are: "a definite expiration date;" "a description of the real property involved;" "the list price of the property;" "any terms required by the seller;" "the amount of any compensation or commission or the basis for computing the commission;" "a clear statement explaining the events [and] conditions that will entitle a broker to a commission;" information regarding an override clause (if applicable), including a statement regarding the inclusion of a protective list; a notice stating that compensation will be determined between the broker and the client; "a dual agency disclosure statement;" a notice regarding the seller's approval of arrangement of closing services by the broker; and for residential listings, a notice regarding non-payment of commissions in the event that the seller engages another broker after the expiration of the initial agreement. *Id.*

54. *Id.* § 82.21, subd. 2(b)(6) (emphasis added).

55. *Id.* § 82.21, subd. 2(e).

56. *See Rosenberg II*, 685 N.W.2d 320 (2004).

supreme court's resolution of this issue, however, it is useful to examine prior case law addressing Minnesota Statutes section 82.21, subdivision 2 and the procuring cause doctrine.

D. Prior Application of Section 82.21 in Minnesota Courts

1. Lynn Beechler Realty Co. v. Warnygora

In 1986, the Minnesota Court of Appeals first addressed the issue of whether the requirements of section 82.21 (then Minnesota Rules 2800.3800) abrogate the procuring cause doctrine in *Lynn Beechler Realty Co. v. Warnygora*.⁵⁷ In that case, the respondents/sellers entered into a listing agreement with the appellant/broker to sell lakeshore property in Duluth, Minnesota.⁵⁸ After the expiration of the agreement, the sellers enlisted a different real estate agent and eventually sold the home through that agent.⁵⁹ Although the listing agreement included a standard override clause, the broker failed to provide a protective list.⁶⁰

In *Lynn Beechler Realty*, the court addressed the broker's argument that the original listing agreement had been implicitly extended by the parties, and stated that even if the agreement had been extended, the "[broker] still should have given respondents a protective customer list within seventy-two hours of [the termination date]."⁶¹ More importantly, however, the court also addressed the broker's argument that it was entitled to a commission because it was the procuring cause of the sale under *Spring Co. v. Holle*. The court stated, "The facts in *Spring Co.* are similar to those in this case. However, *Spring Co.* precedes the promulgation of [the listing agreement requirements], and does not apply."⁶² As a result, the court in *Lynn Beechler Realty* determined that the override remedy provided in section 82.21, subdivision 2 was the exclusive remedy through which brokers could receive post-termination commissions and implicitly held that the statute abrogated the common law procuring cause

57. 396 N.W.2d 717 (Minn. Ct. App. 1986).

58. *Id.* at 718.

59. *Id.*

60. *Id.*

61. *Id.* at 719. The court referenced Minnesota Rules 2800.3800 subparts 4 and 5 (currently Statutes section 82.21, subdivisions 2(d)(1) and 2(e)). *Id.* at 719-20.

62. *Id.*

doctrine in those situations.

2. Realty House, Inc. v. Grimm

In 1990, the Minnesota Court of Appeals again opined on the intended enforcement of section 82.21's (then renumbered Minnesota Rules 2805.1200) listing agreement requirements in *Realty House, Inc. v. Grimm*.⁶³ In that case, the respondents/sellers entered into a listing agreement with the appellant/broker to sell their home.⁶⁴ The agreement contained a standard override clause, as well as an explicit reference to the seventy-two hour protective list requirement.⁶⁵ In *Realty House*, the prospective buyer cancelled the initial purchase agreement because of costly defects discovered shortly after the expiration of the initial listing agreement.⁶⁶ The sellers subsequently entered into a purchase agreement with the same buyer for a substantially lower price.⁶⁷ Although the trial court held that the sellers "had a contractual obligation to pay a commission to [the broker] even though [the broker] failed to provide a protective list after the agreement expired,"⁶⁸ the Minnesota Court of Appeals reversed.

Relying on its interpretation in *Lynn Beechler Realty*, the court commented on the necessity of strict compliance with the override clause requirements:

The burden of producing a protective list is not great. The realtor is familiar with real estate rules, knows when the listing agreement expires, has the information the protective list requires, and is accustomed to providing such lists. Thus, even if a purchase agreement has been signed when the listing agreement expires, a realtor wishing to protect its commission should provide . . . a protective list.⁶⁹

Although the court of appeals did not directly address the procuring cause doctrine in *Realty House*, its holding reinforced the view that when a listing agreement expired, a broker could only recover commissions by application of an override clause and

63. 460 N.W.2d 917 (1990).

64. *Id.* at 918.

65. *Id.*

66. *Id.* at 918-19.

67. *Id.* at 919.

68. *Id.*

69. *Id.* at 920.

protective list.

3. Douglas v. Schuette

In 2000, the Minnesota Court of Appeals even more explicitly addressed Minnesota Statutes section 82.21's (then codified in section 82.195) displacement of the procuring cause doctrine in *Douglas v. Schuette*.⁷⁰ *Douglas* involved the cancellation of a purchase agreement for 420 acres of land by a buyer who questioned the broker's business practices.⁷¹ After the expiration of the listing agreement between the appellant/broker and the respondent/seller, the seller hired a new real estate agent and the original buyer agreed to purchase the land.⁷² The broker filed suit for commissions on the sale.⁷³

On appeal, the Minnesota Court of Appeals noted that the broker might have been able to recover a commission subject to the override clause in the original listing agreement, but had not provided the seller with a protective list as required by Minnesota Statutes section 82.21.⁷⁴ The court responded to the broker's argument that the appellant was entitled to a commission as the agent who procured the eventual buyer by stating, "this court has held that a real estate agent *cannot recover a commission by relying on the procuring-cause doctrine.*"⁷⁵

In spite of the Minnesota Court of Appeals' strict enforcement of section 82.21 in *Realty House* and clear statements of the statute's abrogation of the common law procuring cause doctrine in *Lynn Beechler* and *Douglas*, the Minnesota Supreme Court responded with a different view in 2004.

70. 607 N.W.2d 142 (Minn. Ct. App. 2000).

71. *Id.* at 144.

72. *Id.*

73. *Id.*

74. *Id.* at 145-46.

75. *Id.* at 146 (citing *Lynn Beechler Realty Co. v. Warnygora*, 396 N.W.2d 717, 720 (Minn. Ct. App. 1986) (emphasis added)).

III. ROSENBERG V. HERITAGE RENOVATIONS, LLC

A. Facts

In July 1997, Gary Rosenberg (Rosenberg), doing business as Shelter Consultants, entered into an agreement with Heritage Marketing, LLC (Heritage)⁷⁶ involving the sale of 350 individual condominium units in the RiverStation development project near downtown Minneapolis.⁷⁷ Under the agreement, Rosenberg served as the salesperson for the project in exchange for “commissions of 2.5% on coop sales and 3.5% on in house sales,” as well as “a draw against commissions of \$3,000 per month together with an advance of \$1,500 per unit” upon the approval of each purchase agreement.⁷⁸ The agreement provided that the balance of the commissions were to be paid upon closing.⁷⁹ The agreement did not include an express termination date, but the terms stated that Rosenberg was “to work the model sales center hours throughout the time frame of the project.”⁸⁰ The agreement contained no override or extension clause.⁸¹

Rosenberg sold condominiums pursuant to the agreement with Heritage beginning in July 1997 and into February 2001.⁸² On February 14, 2001, however, Heritage informed Rosenberg that the contract was terminated and that he should stop selling condominium units on its behalf.⁸³ As of February 14, Rosenberg

76. The developers involved in the RiverStation project in fact formed two corporations to complete the project: Heritage Renovations, LLC to be the owner and developer of the project, and Heritage Marketing, LLC to provide marketing and sales services to Heritage Renovations. *Rosenberg II*, 685 N.W.2d at 322.

77. *Rosenberg v. Heritage Renovations, LLC*, No. C7-03-94, 2003 WL 21694604, at *1 (Minn. Ct. App. July 22, 2003) (unpublished opinion) [hereinafter *Rosenberg I*]; Brief for Respondent at 6, *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320 (Minn. 2004) (No. C7-03-94) [hereinafter Respondent’s Brief].

78. *Rosenberg II*, 685 N.W.2d at 323.

79. *See id.*

80. *Id.*

81. *Id.* at 323-24.

82. *Id.* at 323.

83. *Id.* Although the court in *Rosenberg II* did not comment on the reason for the termination of the listing agreement between Rosenberg and Heritage, Heritage’s brief to the Minnesota Supreme Court provides some insight:

Heritage Marketing and its prospective buyers had difficulties with [Rosenberg’s] abrasive personality as well as his lack of responsiveness and failure to staff the model condominiums. Heritage Marketing received numerous complaints about [Rosenberg], including a written

claimed to have “almost 40 purchasers under contract[,] . . . 18 as purchase agreements and 20 as reservation agreements.”⁸⁴ Rosenberg sued Heritage Marketing,⁸⁵ claiming that he was entitled to commissions on the sales that he procured before the agreement was terminated.⁸⁶ On November 18, 2002, the district court granted summary judgment in favor of Heritage on grounds that Rosenberg’s failure to include an override clause in the agreement precluded him from receiving post-termination commissions.⁸⁷ Rosenberg appealed.⁸⁸

B. The Court of Appeals’ Analysis

The Minnesota Court of Appeals reconsidered the trial court’s determination regarding Rosenberg’s entitlement to commissions after his termination from the RiverStation project.⁸⁹ To arrive at its conclusion, the court applied a straightforward application of Minnesota Statutes section 82.21 as interpreted in *Realty House, Inc. v. Grimm*. The court of appeals stated:

complaint from a prospective buyer who accused [Rosenberg] of . . . “steering” in the sale of the condominiums. When informed of the latter complaint, [Rosenberg] simply informed Heritage Marketing that the buyer’s perception was “[its] problem,” evidencing complete lack of “customer service” mentality.

Respondent’s Brief, *supra* note 77, at 6. Not surprisingly, Rosenberg’s brief described the termination very differently:

On or about January 31, 2001, without any advance warning or any stated reason, [Heritage] told Rosenberg that [it] wanted Rosenberg to voluntarily withdraw from the RiverStation venture. Rosenberg refused. On or about February 1, 2001, [Heritage] claims to have sent a facsimile termination letter to Rosenberg, although Rosenberg did not receive it. The letter cites no reasons for the termination. The first time Rosenberg saw any alleged “reason” for his termination was during discovery at this proceeding.

Brief for Appellant at 10, *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320 (Minn. 2004) (C7-03-94) (citations omitted) [hereinafter Appellant’s Brief].

84. *Rosenberg II*, 685 N.W.2d at 323.

85. In fact, Rosenberg sued both Heritage Renovations and Heritage Marketing. However, Heritage Renovations was dismissed from the suit as an unnecessary party because it was not named in the agreement between Rosenberg and Heritage Marketing. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 324.

89. *Rosenberg I*, No. C7-03-94, 2003 WL 21694604, at *3 (Minn. Ct. App. July 22, 2003). The court also considered questions of whether the listing agreement was valid, whether it was terminable at will, and whether the agreement created a joint venture between Rosenberg and Heritage. *Id.* at *2-3.

Recovery of commissions for sales that occur after termination of the listing agreement requires that the real-estate agent include in the listing agreement an override clause and, after expiration or termination of the agreement, that the real-estate agent provide the seller with a protective list.⁹⁰

Because the listing agreement between Rosenberg and Heritage did not contain an override provision and Rosenberg failed to provide a protective list within the seventy-two hour period prescribed by the statute, the court held that “[he] could not recover for any unpaid commissions that he otherwise might have been entitled to after [Heritage] terminated the agreement.”⁹¹ Accordingly, the court of appeals affirmed the district court’s ruling.⁹² Rosenberg appealed to the Minnesota Supreme Court.⁹³

C. *The Supreme Court’s Analysis*

The Minnesota Supreme Court handled the disputed commissions much differently than the lower courts. In *Rosenberg*, the court acknowledged that because the agreement between Rosenberg and Heritage required that all sales close in order for commissions to be earned, Rosenberg did not earn his commissions at the time the purchase agreements were signed⁹⁴ and thus, Rosenberg had not “performed all that he undertook to perform” under the contract at the time of his termination.⁹⁵ Because of the absence of a contractual remedy, the supreme court looked to precedent involving the procuring cause doctrine.⁹⁶ Citing *Spring Co.*, the court stated that “a broker has a right to a commission when the broker has been the procuring cause for the sale, even though the sale is completed after the listing agreement has terminated and the commission had not been earned prior to termination.”⁹⁷ The court noted that this rule is based on the

90. *Id.* at *4 (citing *Realty House, Inc. v. Grimm*, 460 N.W.2d 917, 920 (Minn. Ct. App. 1990)).

91. *Id.* at *4.

92. *Id.*

93. *See Rosenberg II*, 685 N.W.2d at 324.

94. The court noted that “[t]he July Agreement specifies that if a sale does not ultimately close, any advance given to Rosenberg for the purchase agreement would be refunded or applied to the next signed purchase agreement.” *Id.* at 327.

95. *Id.* (citing *Greer v. Kooiker*, 312 Minn. 499, 510, 253 N.W.2d 133, 141 (1977)).

96. *See id.* at 327-28.

97. *Id.* at 327 (citing *Spring Co. v. Holle*, 248 Minn. 51, 55, 78 N.W.2d 315,

principle that “no one can avail himself of the nonperformance of a condition precedent who has himself occasioned its nonperformance.”⁹⁸ Applying these principles to the situation in *Rosenberg*, the court reasoned that because Heritage caused the nonperformance of the closings (the conditions precedent) required for Rosenberg to earn his commissions by abruptly terminating the listing agreement, it could not argue that Rosenberg should not receive commissions on those sales when they eventually closed.⁹⁹ However, the court acknowledged the possibility that Minnesota Statutes section 82.21 might abrogate the common law procuring cause doctrine.¹⁰⁰ The court then examined that possibility.

The court considered two interpretations regarding the effect of Statutes section 82.21.¹⁰¹ The first interpretation of the statute considered by the court involved the possibility that section 82.21 provides a liberal “alternative remedy” to allow brokers to collect commissions even when they are not the procuring cause of the sale as defined by the common law.¹⁰² Under this view, the statute then acts as a limitation on this remedy by “requiring that the listing agreement include the precise terms, and that the broker take the precise actions, specified in [the statute].”¹⁰³ The supreme court explained this interpretation by noting that the override remedy provided by the statute is much broader than the common law procuring cause remedy.¹⁰⁴ The court contrasted the common law’s requirement that the broker’s work set into motion a continuous course of events leading to the eventual sale in order to earn a commission,¹⁰⁵ with section 82.21’s override remedy, which demands only a sale to “any person who . . . contacted the broker or who showed an interest in the property during the term listing.”¹⁰⁶ Additionally, the court agreed with this interpretation

318 (1956)).

98. *Id.* (citing *Olson v. Penkert*, 252 Minn. 334, 343, 90 N.W.2d 193, 200 (1958)).

99. *Id.*

100. *See id.*

101. *See id.* at 328.

102. *See id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing *Spring Co. v. Holle*, 248 Minn. 51, 56, 78 N.W.2d 315, 318 (1956)).

106. *Id.* (citing MINN. STAT. § 82.195, subd. 5 (2002), currently MINN. STAT. § 82.21, subd. 2(e) (2004)).

because, in the court's view, section 82.21 does not specifically mandate the inclusion of an override clause in every listing contract, but rather "describes what such clauses must contain if they are included."¹⁰⁷

The second reading of Minnesota Statutes section 82.21 considered by the court suggested that the statute "so comprehensively addresses the subject of the effect of the termination of a listing agreement on a broker's right to commissions that the statutory override remedy was intended to be exclusive."¹⁰⁸ The court noted support of this interpretation by the Minnesota Court of Appeals in *Lynn Beechler Realty*,¹⁰⁹ but went on to explain why this interpretation was incorrect.

First, the court pointed to the fact that Minnesota Statutes section 82.21 contains no explicit language stating that the override remedy provided in the statute was meant to displace the procuring cause doctrine or any other common law remedies.¹¹⁰ The court noted that normally, when the legislature intends to supplant the common law through statute, it does so expressly.¹¹¹

Second, the court argued that "the legislature expressly *disclaimed* any intent to abrogate the common law" both at the time the statute was first enacted in 1993, and upon its amendment in 1994.¹¹² The court noted that in 1993, the "Scope and Effect" section of Chapter 82 of Minnesota Statutes stated: "The requirement for disclosure of agency relationships set forth in this chapter are intended only to establish a minimum standard for regulatory purposes, and *are not intended to abrogate common law.*"¹¹³

107. *Id.*

108. *Id.*

109. *Id.*; see *Lynn Beechler Realty Co. v. Warnygora*, 396 N.W.2d 717, 720 (Minn. Ct. App. 1986). The supreme court noted that the only reason given supporting the conclusion that Statute section 82.21 abrogated the procuring cause doctrine by the court in *Lynn Beechler Realty* was that the common law rule preceded the statute. *Rosenberg II*, 685 N.W.2d at 328.

110. *Id.* at 328-29.

111. *Id.* at 328. In a footnote, the court cited Minnesota Statutes section 176.031 as an example of this type of language. *Id.* at 328 n.7. The statute, which involves Minnesota Workers' Compensation law, states that "[t]he liability of an employer prescribed by this chapter is *exclusive and in the place of any other liability . . .*" *Id.* (emphasis added). The court also noted Minnesota's No-Fault Automobile Insurance statute, section 65B.51, subdivisions 1 and 3, which supplants the common law by providing that "*no person shall recover damages for noneconomic detriment unless . . .*" *Id.* (emphasis added).

112. *Id.* at 329 (emphasis added).

113. *Id.* (citing Act of May 20, 1993, ch. 309, § 9, 1993 Minn. Laws 1794, 1801

The court also noted that as amended in 1994, the statute maintained this intent through the language: “Disclosures made in accordance with the requirements for disclosure of agency relationships set forth in this chapter are sufficient to satisfy common law disclosure requirements.”¹¹⁴

Third, the Minnesota Supreme Court pointed to its historic reluctance to allow a statute to abrogate the common law when the intent is not expressed in the statute.¹¹⁵ The court stated, “Statutory enactments, even though they provide new procedures to enforce pre-existing rights at law and in equity, are to be read in harmony with the existing body of law, inclusive of existing equitable principles, unless an intention to change or repeal it is apparent.”¹¹⁶

Finally, the court noted that Minnesota Statutes section 82.21 does not *require* an override clause in every listing agreement, but makes it optional by including the language “if applicable.”¹¹⁷ As a result, the supreme court concluded that genuine issues of material fact existed with regard to Rosenberg’s procuring cause claims and remanded for trial of those claims.¹¹⁸

IV. ANALYSIS OF THE *ROSENBERG* DECISION

In *Rosenberg*, the Minnesota Supreme Court adopted the proposition that the use of an override clause under section 82.21 was intended to provide a liberal alternative remedy to the procuring cause doctrine, while retaining the court’s authority to use the procuring cause remedy when equity requires.¹¹⁹ In light of the comprehensive coverage and mandatory nature of the statute, however, it is likely that section 82.21 was meant to abrogate the

(alteration in original)).

114. *Id.* (citing MINN. STAT. § 82.197, subd. 3 (2002)).

115. *Id.*

116. *Id.* (citing *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955)).

117. *Id.* at 330 (citing MINN. STAT. § 82.197, subd. 2(6) (2002), currently MINN. STAT. § 82.21, 2(b) (6) (2004)).

118. *Id.* The court described the result in a Colorado case involving a similar statute: “A similar conclusion was reached by the Colorado Court of Appeals in *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*, 996 P.2d 151, 154 (Colo. Ct. App. 1999). The court rejected the argument that a statute regulating the relationships between real estate brokers and sellers was intended to supplant existing common law, holding that the statute did not eliminate the common law procuring cause remedy.” *Id.* Justice Russell A. Anderson and Chief Justice Kathleen A. Blatz dissented. *Rosenberg II*, 685 N.W.2d at 332-34.

119. *Rosenberg II*, 685 N.W.2d at 328; ROBERTS, *supra* note 12, § 1.12.

common law procuring cause doctrine and provide an exclusive remedy for realtors to recover post-termination commissions.

A. *Flaws in the Supreme Court's Analysis*

In order to facilitate its interpretation of Minnesota Statutes section 82.21, subdivision 2 in *Rosenberg*, the Minnesota Supreme Court relied little on the substance of the statute and focused instead on more generalized reasoning. While there is merit to the court's reliance on the principle that the legislature would have expressly provided for abrogation of the procuring cause doctrine if that was what it intended,¹²⁰ the court provided little further persuasive reasoning regarding the effect of the statute.

1. *The Legislature's Intent*

The court's chief substantive argument in *Rosenberg* was that Chapter 82 lacks an *affirmative* statement of the legislature's intent to supplant the procuring cause remedy.¹²¹ While that statement is true, the court incorrectly argued that the statute states the legislature's intent *not to supplant the common law* through language in the Scope and Effect statement of section 82.22.¹²² To make its argument, the court relied on the clause, "sufficient to satisfy common law disclosure requirements" in section 82.22.¹²³ However, as Justice Russell A. Anderson correctly argued in his dissenting opinion, the court's reasoning on this point is flawed because that clause is, by its location at the beginning of the section addressing agency disclosure requirements, intended only to apply to that portion of the statute.¹²⁴ For the court's argument to have the desired effect, a similar statement of scope and effect would have to be included before section 82.21, or better, at the head of the statute. As a result, rather than proving that the Minnesota legislature expressly retained the *procuring cause doctrine* in section

120. See *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990) ("We have long followed the presumption that statutory law is consistent with common law If statutory enactment is to abrogate common law, the abrogation must be by express wording or necessary implication." *Id.* at 377-78.).

121. See *Rosenberg II*, 685 N.W.2d at 328-29.

122. Specifically, the supreme court stated that "the initial version of section [82.22] expressly disclaimed any intent to abrogate the common law and the amended version expressly recognized that common law requirements continue to exist and are not replaced by the statute." *Id.* at 329.

123. See *id.*

124. *Id.* at 333-34 (Anderson, J., dissenting).

82.21, the court inadvertently made a strong argument advocating that section 82.22 retained Minnesota's *common law agency disclosure requirements*.¹²⁵ In addition, if the court's reasoning is taken one step further, the legislature's express statement of its desire not to abrogate one common law doctrine in one section of the statute leads to the conclusion that the legislature would have also expressly retained other common law rules in other sections, including the procuring cause remedy in section 82.21, if that is what it intended.

2. *The Mandatory Nature of the Statute*

In addition to the above errors in the court's analysis, the court misinterpreted the comprehensive coverage of the statute and the mandatory nature of section 82.21's override remedy as "permissive" when it stated that "[t]he statute does not require that an override clause be included in a listing agreement but treats it as optional—'if applicable.'"¹²⁶ This analysis by the court oversimplifies the requirements of the statute. Very few of the rules governing real estate brokers and salespersons in chapter 82 are permissive.¹²⁷ Instead, the requirements of the statute are set out in mandatory language, using the terms "must" and "shall."¹²⁸ This mandatory language extends to actions for commissions, and also applies to listing agreements, override clauses, and protective lists.¹²⁹

To bring a civil action for commissions under Chapter 82, a broker *must* have a written agreement.¹³⁰ Further, in the introductory language of section 82.21, subdivision 2, the statute

125. The agency disclosure requirements of Minnesota Statutes section 82.22 require that a broker "provide to a consumer in the sale and purchase of a residential property transaction at the first substantive contact with the consumer an agency disclosure form" that substantially complies with the statutory requirements for disclosure forms, which are also set out in detail in the statute. MINN. STAT. § 82.22, subs. 2, 4 (2004).

126. *Rosenberg II*, 685 N.W.2d at 330 (emphasis added).

127. *See, e.g.*, MINN. STAT. § 82.21, subd. 2(d)(2) (2004) ("A listing agreement *may* contain an override clause of up to two years in length when used in conjunction with the purchase or sale of a business." (emphasis added)).

128. *See Rosenberg II*, 685 N.W.2d at 332-34 (Anderson, J., dissenting). "There can be no disputing the fact that licensed real estate brokers are required to comply with the provisions of chapter 82. The mandatory nature of [section 82.21] is evidenced by the terms utilized by the legislature . . ." *Id.* at 332 n.1 (Anderson, J., dissenting).

129. *See* MINN. STAT. §§ 82.18, 82.21 (2004).

130. *Id.* § 82.18, subd. 2 (2004).

requires: “Licensees *shall* obtain a signed listing agreement or other signed written authorization . . . before advertising to the general public that the real property is available for sale or lease.”¹³¹

After the statute sets out that listing agreements are required, it delineates the necessary elements of those agreements: “All listing agreements *must* be in writing and *must* include [the required elements].”¹³² Section 82.21 requires various elements that *must* be included in a valid listing agreement.¹³³ One of those elements is “information regarding an override clause, *if applicable*.”¹³⁴ The Minnesota Supreme Court focused on the words “if applicable” in *Rosenberg*, holding that the words make inclusion of an override clause entirely optional.¹³⁵ While that statement is generally true in that parties are not mandated by the statute to include an override clause in *all situations*,¹³⁶ the choice to exclude the provision necessarily carries certain consequences regarding the receipt of commissions. The Minnesota Supreme Court’s interpretation eliminates these consequences.

Under the court’s interpretation, the phrase “if applicable” in subdivision 2(b)(6) merely suggests that a listing agreement *may* include information regarding an override clause if the broker wants it to contain that information, and if not, the broker can fall back on the procuring cause doctrine to recover commissions. This is not the best interpretation, however. Instead, that subdivision should be read as a mandate that a listing agreement *must* include information regarding an override clause if the broker wants to recover commissions after the expiration of the listing agreement. This interpretation makes sense for two reasons.

First, the statute’s definition of “override clause” implies this result.¹³⁷ Section 82.17 of the statute defines an override clause as “a provision in a listing agreement . . . *allowing* the broker to receive compensation . . . after the listing agreement has expired.”¹³⁸ This definition suggests that only an override clause will *allow* a broker

131. *Id.* § 82.21, subd. 2(a) (emphasis added).

132. *Id.* § 82.21, subd. 2(b) (emphasis added).

133. *Id.* § 82.21, subd. 2(b)(1)-(10).

134. *Id.* § 82.21, subd. 2(b)(6) (emphasis added).

135. *See Rosenberg II*, 685 N.W.2d at 330.

136. *See* Respondent’s Brief, *supra* note 77, at 23 (“The override clause is a matter of negotiation between seller and realtor If there is no ‘override clause,’ then the realtor has no contractual basis to obtain commissions for sales that close after the listing agreement ends.”).

137. *See* MINN. STAT. § 82.17, subd. 12 (2004) (defining “override clause”).

138. *Id.* (emphasis added).

to receive post-termination commissions; without an override clause, recovery of those commissions is not *allowed*. Second, section 82.21(b)(5) requires that all listing agreements include “a clear statement explaining the events or conditions that will entitle a broker to a commission”¹³⁹ This requirement furthers the implication that a broker who intends to receive commissions after the expiration of the agreement *must* include an override clause as one of those “events.”¹⁴⁰ As a result, read in the context of the mandatory “must” tone of section 82.21, the phrase “if applicable” should be interpreted to mean that “applicable” situations are those in which the broker will have the opportunity to receive post-termination commissions. Accordingly, situations in which this opportunity is not available, such as the case in *Rosenberg*, are “non-applicable” situations.¹⁴¹

3. *Time Limits for Enforcement*

The court’s interpretation allowing use of the procuring cause remedy also negates the statute’s time restriction for obtaining post-termination commissions.¹⁴² As Justice Anderson noted in his dissent, subdivision 2(c) of section 82.21 prohibits the inclusion of

139. *Id.* § 82.21, subd. 2(b)(5).

140. *See Rosenberg II*, 685 N.W.2d at 333 (Anderson, J., dissenting). In dissent, Justice Anderson stated:

The common law principle relied upon by the majority is nowhere referenced in the listing agreement, which, according to statute, must contain “a clear statement explaining the events or conditions that will entitle a broker to a commission.” Minn.Stat. § 82.195, subd. 2(b)(5). When the legislature provides that events or conditions that will entitle a broker to a commission must be explained in a “clear statement” in the listing agreement, I would conclude that a common law claim, neither mentioned nor explained by a clear statement in a listing agreement, is barred.

Id.

141. The mandatory nature of chapter 82 can also be seen in the legislative history involving the codification of the statute in 1993. In a hearing before the Senate Committee on Commerce and Consumer Protection, a member of the Department of Commerce described the requirements as “a prohibition that you cannot maintain an action for commission[s] if you fail to get that particular listing agreement.” Respondent’s Brief, *supra* note 77, at 30 n.3 (citing *An Act Relating to Real Estate, 1993; Hearings on S.F. No. 1000 Before the Senate Committee on Commerce and Consumer Protection; April 7, 1993* (Statement of Dick Gomsrud, Department of Commerce)). This statement provides additional support for the conclusion that a broker who fails to comply with the requirements of section 82.21 should not be allowed to rely on alternative remedies outside of the statute.

142. *See* MINN. STAT. § 82.21, subd. 2(c) (2004).

“a holdover clause, automatic extension, or *any similar provision*, or an override clause the length of which is more than six months after the expiration of the listing agreement.”¹⁴³ Presumably, the intended effect of this clause is to limit the length of time in which a broker can collect commissions after the termination of a listing agreement. Applying the court’s interpretation, however, a broker could receive commissions under the procuring cause remedy, which contains no time restraint, far beyond the six-month limit.¹⁴⁴ This result contravenes this statutory provision.

B. Consumers, Certainty, and Preventing Disputes

1. Chapter 82 Protects Consumers

The Minnesota Supreme Court ignored the overall intent of Chapter 82 of Minnesota Statutes in its interpretation in *Rosenberg*. In fact, the overall purpose of the statute is not even mentioned in the court’s opinion.¹⁴⁵ Simply put, Chapter 82 of Minnesota Statutes was “enacted to protect the public from unqualified or unreliable real estate brokers.”¹⁴⁶ This overarching goal of

143. *Id.* (emphasis added).

144. *See Rosenberg II*, 685 N.W.2d at 333 (Anderson, J., dissenting). In dissent, Justice Anderson stated:

The length of the override provision may not extend more than 6 months beyond the expiration of the listing agreement and, with exception not applicable here, a broker “shall not” include in a listing agreement a holdover clause, automatic extension, “or any similar provision” Minn.Stat. § 82.195, subd. 3 (2002). The majority apparently believes that beneath these clear and comprehensive statutory requirements and prohibitions is a surviving common law equitable remedy which allows a broker to recover a commission when the broker is the procuring cause of a sale completed after termination of the listing agreement. In my view, the majority has read into this listing agreement a “similar provision” to an override clause that the legislature has clearly prohibited.

Id.

145. *See id.* at 320.

146. Respondent’s Brief, *supra* note 77, at 28 (quoting *Albers v. Fitschen*, 274 Minn. 375, 37[6], 143 N.W.2d 841, 84[3] (1966)). *Compare* MINN. STAT. § 82 (2004) *with* COLO. REV. STAT. § 12-61-801 (2004). The legislative declaration that proceeds Colorado’s statute governing real estate brokerage relationships states:

The general assembly finds, determines, and declares that the *public will best be served* through a better understanding of the public’s legal and working relationships with real estate brokers and by being able to engage any such real estate broker on terms and under conditions that the public and the real estate broker find acceptable. This includes

providing concrete and specific requirements for real estate brokers can be seen in many aspects of the statute's construction.

Chapter 82 contains numerous provisions preventing brokers from engaging in actions which might prove detrimental to the general public. First, and most importantly, the statute protects the public by requiring Minnesota real estate brokers to be licensed.¹⁴⁷ Minnesota Statutes section 82.18 states that no person can bring an action for compensation in a real estate transaction "without proving that the person was a duly licensed real estate broker . . . at the time the alleged cause of action arose."¹⁴⁸ The statute spells out specific requirements for the licensure of real estate brokers including, for example, a required degree of difficulty for brokers examinations,¹⁴⁹ a minimum of two years of "actual" experience in real estate,¹⁵⁰ a score of seventy-five percent on both the uniform and state portions of the licensure examination,¹⁵¹ and various continuing education requirements.¹⁵² Second, the statute's contract and listing agreement requirements, agency disclosure requirements, prohibitions, and standards of conduct are in place to ensure that brokers do not engage in activities that are potentially harmful to the public.¹⁵³

By interpreting section 82.21, subdivision 2 to allow recovery of commissions even when a broker does not comply with the requirements of the statute, the court does a disservice to the

engaging a broker as a single agent or transaction-broker. *Individual members of the public should not be exposed to liability for acts or omissions of real estate brokers* that have not been approved, directed, or ratified by such individuals. Further, the public should be advised of the general duties, obligations, and responsibilities of the real estate broker they engage.

COLO. REV. STAT. § 12-61-801 (2004) (emphasis added).

147. See MINN. STAT. § 82.18, subd. 1 (2004).

148. *Id.*

149. *Id.* § 82.29, subd. 4(a).

150. *Id.* § 82.29, subd. 4(b). However, an applicant may request that the commissioner waive the actual experience requirement if the applicant can prove either ninety credits or 270 hours of real-estate related coursework, at least five consecutive years of "practical" real-state experience, or a combination of thirty credits or ninety classroom hours and three consecutive years of "practical" experience. *Id.* § 82.29, subd. 5.

151. *Id.* § 82.29, subd. 6.

152. *Id.* § 82.32. The continuing education requirements required by Minnesota Statutes section 82.32 mandate thirty hours of continuing education per year as a student or lecturer. *Id.*

153. See *Lynn Beechler Realty v. Warnygora*, 396 N.W.2d 717, 721 (Minn. Ct. App. 1986) ("However, the Rules are specifically intended to protect homeowners.").

public by exposing sellers to claims for unwarranted commissions by brokers who have simply failed to meet Minnesota's statutory requirements. As the Minnesota Court of Appeals noted in *Realty House*, "the application of this rule may seem harsh when a realtor has earned a commission, or when . . . there is misrepresentation or deception. However, the policy considerations behind the Rules Relating to Real Estate support a strict application."¹⁵⁴ Although this public-oriented policy goal may not arise in the case of the sophisticated parties in *Rosenberg*, the implications of the case certainly have the potential to affect unsophisticated sellers in the future.

2. Section 82.21 Promotes Certainty and Prevents Disputes

In addition to effectuating the requirements of the statute intended to generally benefit the public, an interpretation of section 82.21, subdivision 2 as a broker's exclusive remedy for post-termination commission claims promotes certainty when disputes arise. The proposition that Minnesota Statutes section 82.21 promotes certainty is well stated in a passage from Heritage Renovations' brief to the Minnesota Supreme Court:

The Rules [set out in section 82.21] are not at all difficult or onerous, but they serve the important goal of protecting sellers from overreaching realtors and providing for orderly sales of property where the rights of the seller and realtor are well defined. The Rules create "bright line" guidance for realtors and sellers. The Rules avoid confusion and should avoid disputes . . . If this Court accepted Appellant's invitation to entirely disregard the Rules . . . the Court would inflict a great disservice on all realtors and sellers. The "bright lines" would give way . . . to a case-by-case analysis of whether, through someone's notion of "equity," the realtor "deserves" a commission.¹⁵⁵

The function of the statute in creating a "bright line" rule is key to its effectiveness. Real estate brokers are trained, licensed professionals who know, or should know, the applicable rules and standards of conduct.¹⁵⁶ As such, brokers would not be unduly

154. *Realty House, Inc. v. Grimm*, 460 N.W.2d 917, 920 (Minn. Ct. App. 1990).

155. Respondent's Brief, *supra* note 77, at 20.

156. See *Realty House*, 460 N.W.2d at 920. In its brief to the Minnesota Supreme Court, Heritage noted that "[a]ny real estate agent in Minnesota should be thoroughly familiar with [section 82.21] and its requirements. It was apparent from his deposition, however, that despite his claimed twenty years experience as a

burdened by being strictly held to the state's statutory requirements. Without this firm enforcement, the statute is ineffective and provides only an unenforceable list of suggestions for real estate practitioners.

The need for certainty in commission disputes is further illustrated by the nature of Rosenberg's commission claims and the burden of analyzing those claims under the procuring cause doctrine. On remand, Rosenberg will be required to present evidence that his efforts did more than merely contribute to the result of the eventual condominium sales for which he claims commissions. Rosenberg will be required to show that his work was the "producing and effective" result of those sales.¹⁵⁷ Because of the fact that almost half of the claimed commissions in *Rosenberg* are based on "reservation agreements" rather than purchase agreements, whether Rosenberg's efforts produced these sales will be the subject of controversy between the parties. This conflict is previewed in Heritage Renovations' brief to the supreme court:

There is no dispute that [Rosenberg] submitted these purchase agreements, but it is equally undisputed that Appellant did nothing to convert the reservation agreements to purchase agreements or to ensure that all contingencies were resolved, that option amendments were executed, that financing was obtained and that the myriad other necessary tasks were undertaken to facilitate the ultimate closing . . . after [Rosenberg] was terminated. The realty firm that replaced [Rosenberg] . . . provided the necessary realty services [after the agreement was terminated].¹⁵⁸

The time consuming case-by-case factual examination that will take place upon remand of Rosenberg's procuring cause claims is precisely the type of inefficiency that was meant to be prevented through the listing agreement requirements in Minnesota Statutes Section 82.21. If Rosenberg had merely complied with the statute's override clause provisions, he would only be required to show that he carried out the activities designated in the clause.¹⁵⁹ Under subdivision 2(e) of section 82.21, these activities could be as simple as proving that a potential buyer made a "showing of interest in the

realtor, [Rosenberg] did not even know what an override clause was." Respondent's Brief, *supra* note 77, at 22.

157. Spring Co. v. Holle, 248 Minn. 51, 56, 78 N.W.2d 315, 318 (1956).

158. Respondent's Brief, *supra* note 77, at 14.

159. See Norwood & Hyde, *supra* note 14, at 1011.

property” or was “physically shown the property.”¹⁶⁰ Requiring the use of an override clause for a broker to receive post-termination commissions encourages the parties to a transaction to consciously negotiate their rights under their agreement, thus preventing lengthy litigation when disagreements arise.¹⁶¹ Under the court’s analysis in *Rosenberg*, however, parties are allowed to wait until a dispute arises and force a court to determine the broker’s rights.

Before *Rosenberg*, Minnesota Courts correctly applied Minnesota Statutes section 82.21, subdivision 2.¹⁶² In *Lynn Beechler Realty, Douglass, and Realty House*, the Minnesota Court of Appeals properly applied Minnesota Statutes section 82.21, subdivision 2 as a set of mandatory requirements that abrogate the common law and prevent inefficient case-by-case analysis.¹⁶³ Without this certainty, both realtors and sellers of real estate are left to guess whether they will be protected by the terms that they negotiated under state law, or surprised by claims that they could not anticipate.¹⁶⁴ This could not be the result that the statute was meant to promote.

V. CONCLUSION

By refusing to allow Minnesota Statutes section 82.21 to abrogate the common law procuring cause remedy in *Rosenberg*, the Minnesota Supreme Court reopened the door for litigation of numerous commission disputes in which brokers fail to include override clauses or provide protective lists. Because the court, through its reliance on lack of express legislative intent to replace the common law in Chapter 82, refused to interpret section 82.21’s override remedy as an exclusive remedy that overrides the procuring cause doctrine, the legislature must step in and clarify the statute.

To remedy the effects of the Minnesota Supreme Court’s interpretation in *Rosenberg*, the Minnesota legislature should amend Statutes section 82.21, subdivision 2 to include an express statement of its intent to override the common law procuring cause doctrine. In addition, the phrase “if applicable” in section 2(b)(6) should be removed and replaced with language clarifying that

160. See MINN. STAT. § 82.21, subd. 2(e) (2004).

161. See Respondent’s Brief, *supra* note 77, at 20.

162. See *supra* Part II.D.

163. See *id.*

164. See *id.*

commissions on sales procured, but not consummated before the end of a listing agreement cannot be enforced if an override clause is not provided. With these changes to the statute, Minnesota courts can return to their enforcement of the listing agreement requirements in section 82.21 as an abrogation of the common law procuring cause doctrine.