After reading this chapter, you will be able to:

- implement a safety clause provision in listing agreements to earn a fee for your marketing efforts when the client sells or buys after your employment expires;
- document and register prospective buyers or properties located during the employment to perfect your right to earn a fee on related transactions after the employment expires; and
- avoid conflicts for prospective clients with their former broker when taking a listing during a safety period under their prior listing.

**Key Terms**

broker cooperation provision  
safety clause  
fee-sharing agreement  
safety period  
procuring cause

A broker is retained to represent a seller by entering into an employment agreement, commonly called a *listing*. The listing, either exclusive or open, contains a *safety clause* stating the broker has earned the agreed fee when:

- an individual has direct contact with the broker (or their agent) regarding the property during the listing period, called *solicitations*;
- the broker treats the individual as a *prospective buyer* due to their inquiries or conduct, by handing them a package of information about the property, called *negotiations*;
- negotiations with the prospective buyer terminate without resulting their entering into an agreement to purchase the property;
• the listing period expires and the broker timely registers the individual by name with the seller as a prospective buyer; and

• the individual and the seller, with or without the broker’s further involvement, later commence negotiations within an agreed period of time following the expiration of the listing, called the safety period, and eventually complete a sale of the property. [See first tuesday Forms 102 and 103]

For example, during the listing period, a seller’s agent has contact with prospective buyers. All of the buyers are handed a listing package fully disclosing the property’s condition.

The agent’s discussions with each buyer and the property information given to each buyer and their agent are noted on a File Activity Sheet in the agent’s listing file. [See first tuesday Form 520]

Also, each prospective buyer’s name, address or phone number are added to the list of prospective buyers for the property on a registration form also maintained in the listing file. [See Form 122 accompanying this chapter]

After “follow-up” conversations with the prospective buyers, the agent has no further contact with any of them. The listing period expires and the property remains unsold.

Continuing the previous example, on expiration of the listing, the agent hands their seller a registration form. The registration form contains the list of prospective buyers the agent provided with property information to. After the delivering the registration form, the agent closes their file on the property.

The registration form is designed for the agent to routinely enter the names of all prospective buyers who, during the listing period, were in contact with and received information about the property from the seller’s broker or their agents. Further, the form lists any prospective buyers the agent knows have been provided information about the property through a buyer’s agent. [See Form 122]

Likewise, when a buyer’s listing agreement expires, a buyer’s agent will hand the buyer a list of qualifying properties the buyer was presented information on during the listing period. [See first tuesday Form 123]

Within the safety period after the listing agreement expires, if a buyer registered by the agent on the list of prospective buyers enters into negotiations with the seller and purchases the property, the broker is entitled to a fee as earned under the listing agreement.

Similarly, when a property registered by the buyer’s agent under a buyer’s listing agreement is purchased by the buyer due to negotiations occurring during the safety period, the buyer’s broker is entitled to their fee as earned under the listing.
On the agent’s discovery of the completed sale, the broker needs to make a written demand on the seller or buyer for their fee earned and unpaid under the safety clause in the expired listing. [See first tuesday Form 123-1]

The seller refuses to pay the broker a fee, claiming the broker has no right to a fee since neither the broker nor their agent was the procuring cause of the sale, i.e., the broker did not obtain and submit the offer.

The broker claims they do not need to be the procuring cause to be entitled to a fee since a prospective buyer who was provided information about the property during the listing period and registered with the seller acquired the property as a result of negotiations commenced during the safety period.

Is the broker entitled to a fee from the seller?

Yes! The seller owes the broker a fee as earned under the safety clause in the listing agreement’s fee provision. A prospective buyer reviewed information about the property with the broker’s agent during the listing period and was registered with the seller.

After the listing expired, the registered buyer acquired the property as a result of negotiations commenced during the safety period, either directly with the seller or through another broker. The earning of a fee due under the listing agreement’s fee provision was not limited solely to procuring a buyer.1

Contrary to the claims of the seller, a broker does not need to be the procuring cause of a sale if the brokerage fee is earned under the safety clause. The safety clause is always triggered by negotiations which have a “fresh start” after the listing expires.

The broker is deemed the procuring cause of a sale if negotiations are initiated during the listing period and then continue beyond the listing period, resulting in a purchase agreement being entered into with the seller.

To market a property and locate a buyer, the seller’s broker and their agent invest their time, talent and money in anticipation of earning a fee. A safety clause in the fee provision of a listing agreement sets an extended period after the listing period expires for the broker to earn that fee. [See first tuesday Forms 102 §3.1(d) and 103 §4.1(c)]

The safety clause preserves the broker’s and agent’s expectations of earnings for having relayed detailed property information to prospective buyers during the listing period. Oftentimes, a prospective buyer, on receiving further facts on a property, becomes disinterested and ends negotiations, then later reappears after the listing expires to buy the property.

A broker earns a fee under the safety clause when:

- property information is provided to prospective buyers during the listing period by the seller’s agent;

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1 Leonard v. Fallas (1959) 51 C2d 649
• the seller is notified of the identification of the prospective buyers as soon as possible after termination of the listing [See first tuesday Form 123-1]; and

• the property is acquired by a prospective buyer disclosed on the list as a result of negotiations conducted during the safety period.

The seller is entitled to the identification of the prospective buyers the agent dealt with on expiration of the listing under agency law. If the seller requests the information from the agent, it needs to be provided — with or without
the existence of a safety clause. However, when a safety clause exists, the agent *perfects their rights* to later earn a fee when they hand the client the buyer information.

A safety clause is part of the fee provision in a listing agreement. Both the open and exclusive types of seller’s and buyer’s listing agreements contain safety clause provisions. [See *first tuesday* Form 102 §3.1(d); see Form 103 §4.1(c) accompanying Chapter XX]

The safety clause imposes an obligation on the seller to pay a fee on a sale which results from negotiations with registered prospective buyers handled by anyone within the safety period. [See *first tuesday* Form 123-1]

Like the period of employment for an exclusive listing agreement, the safety clause contains an expiration date for the extended time period after the listing expires during which the clause is in effect. Typically, safety clauses are drafted to cover a sufficient and reasonable period of time needed to protect the agent’s time and effort spent with prospective buyers on the seller’s behalf.

The safety clause period *commences on termination* of the listing period. Thus, the *termination of a listing* commences the running of both the safety clause period and the period for putting the seller on notice of prospective buyers. A listing is terminated when:

- the seller *withdraws the property* from the market during the listing period;
- the seller *terminates the agency* before expiration of the listing period; or
- the listing agreement *expires* at the end of the listing period.

The seller’s premature termination of the broker’s agency relationship does not also terminate the listing period in an exclusive listing agreement which fails to contain a termination-of-agency fee provision.²

Whether or not the listing contains a termination-of-agency clause, premature termination is to be treated as an act which commences the safety clause period. Thus, on *premature termination* of the agency, withdrawal or expiration of the listing period, the agent needs to send the seller the list of prospective buyers they have maintained. The timely delivery of the identification notice is necessary to *perfect their right* of the broker to earn a fee under the safety clause if a prospective buyer conducts negotiations with the seller during the safety period and as a result buys or leases the property. [See *first tuesday* Form 123-1]

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² *Century 21 Butler Realty, Inc. v. Vasquez* (1995) 41 CA4th 888
A broker has the burden of **perfecting** their right to a fee under the safety clause.

Several crucial activities need to be performed by the seller’s agent to **perfect the broker’s right** to a fee under the safety clause, including:

- providing information about the listed property to prospective buyers the agent or buyer’s agents have contact with;
- documenting dealings with prospective buyers by maintaining a **File Activity Sheet** in the listing file [See first tuesday Form 520]; and
- registering the prospective buyers with the seller on termination of the listing by providing the seller with a list of prospective buyers in a timely manner (e.g., within 21 days). [See Form 122]

Most listing agreements contain **broker cooperation provisions** which authorize brokers to work with and share fees with other brokers who represent buyers interested in the listed property. [See Form 102 §4.3]

Thus, when registering prospective buyers with the seller, the broker whose listing contains a **broker cooperation provision** needs to include any buyers with whom buyer’s brokers dealt. If a sale covered by the safety clause occurs, both brokers are protected and will share the fee.

Negotiations which result in a sale do not need to be concluded during the safety clause period for the broker to earn a fee. Further, escrow does not need to close prior to the expiration of the safety period.

When negotiations take place during the safety clause period which lead to a sale of the listed property to a registered prospective buyer, the broker has earned their fee. An acceptance of a purchase offer or the close of a sales escrow **relates back** to the date negotiations took place, a date which, if it falls within the safety clause period, entitles the broker to a fee.3

The **degree of involvement** a broker or their agents needs to have with a buyer during the listing period in order to qualify the buyer as a **prospective buyer** is set by the terms of the safety clause.

For example, a fee provision may state the broker or their agents are required to **personally introduce** the property to a buyer to qualify the buyer as a prospective buyer, not merely conduct negotiations over the phone.4

For all listings, a buyer is not a prospective purchaser under the safety clause if the buyer’s only relationship with the broker is the buyer’s observation of a “For Sale” sign on the property or of a published advertisement regarding the property placed by the broker or their agent.5

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3 Leonard, supra
4 Korstad v. Hoffman (1963) 221 CA2d Supp. 805
5 Simank Realty, Inc. v. DeMarco (1970) 6 CA3d 610
At the very least, a seller’s broker or their agent is required to provide the buyer with information regarding the property to qualify as having commenced negotiations. The agent does not need to produce a written offer from a buyer for the buyer to be a prospective purchaser.

Consider a broker who is retained by a seller under an exclusive right-to-sell listing agreement. It contains a safety clause requiring prospective buyers to have negotiated with the broker or their seller’s agent. [See Form 102 §3.1(d)]

During the listing period, the agent has contact with and provides property information to several individuals. The list of prospective buyers is prepared and delivered to the seller. The seller’s agent includes the names of people who were not contacted or were not provided with any information about the listed property.

During the safety clause period, a person who was registered, but had no contact with the broker or the seller’s agent, negotiates to purchase the property directly from the seller (or through another broker). The negotiations result in a sale.

The broker makes a demand on the seller for a fee since a person registered as a prospective buyer acquired the property through negotiations which commenced during the safety period.

The seller refuses to pay a fee, claiming the broker’s seller’s agent did not treat the person as a prospective buyer since the seller’s agent did not expose the person to the property in any way.

Has the broker earned a fee under the safety clause?

No! For the broker to earn a fee under this safety clause, the broker, the seller’s agent or another agent employed by the broker needs to have entered into negotiations with the likely buyer. For a contact by the seller’s agent with the buyer to be equated to negotiations, the seller’s agent or another agent of the broker needs to have handed the buyer information regarding the property, such as its income and expenses, title conditions, property conditions or operating conditions.

Here, the seller’s agents did not review any aspect of the property with the buyer or the buyer’s agent during the listing period.6

Now consider a seller’s agent who markets a property for a seller under a listing which contains a safety clause requiring negotiations with the buyer as one condition for receiving a fee. The seller’s agent provides detailed information on the property to a likely buyer, including water availability and an estimate of assessments on the property. The agent has several follow-up conversations with the prospective buyer about the property.

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6 Hobson v. Hunt (1922) 59 CA 679

Price paid is different from the listing price
The buyer becomes disinterested in the property due to their interest in another property. On expiration of the listing period, the agent registers the buyer with the seller by delivering the agent’s list of prospective buyers as required by the safety clause.

During the safety clause period, the buyer is contacted by the seller regarding the property. Negotiations result in the prospective buyer’s purchase of the property for less than the listed price.

The seller’s agent’s broker learns of the sale and makes a demand on the seller for a fee.

The seller refuses to pay a fee, claiming the broker is not entitled to a fee since the price paid for the property was less than the full listing price.

The broker claims they have earned a fee under the terms of the listing agreement since the sale was to a registered buyer who negotiated to purchase the property during the safety clause period and acquired it.

Here, the broker is entitled to the agreed fee under the safety clause since the buyer:

• reviewed aspects of the property with the seller’s agent during the listing period;
• was registered with the seller on expiration of the listing;
• negotiated with the seller (or an agent of the seller) during the time period covered by the safety clause; and
• ultimately purchased the property due to the negotiations.

The sale price of the property has no effect on the enforceability of the safety clause. Thus, based on the price paid for the property, the broker earns the percentage of the price paid (or the fixed fee) stated in the listing agreement.7

When a seller relists a property for sale with another broker on the expiration of a listing, a properly worded and perfected safety clause remains enforceable. [See Form 102 §3.1(d)]

Thus, a broker or their agent entering into a property listing needs to first inquire into the existence of any unexpired safety clause in a prior listing the seller had on the property with another broker.

What the new listing agent wants to avoid is exposing the seller to multiple fees when the property is sold under the new listing to a prospective buyer registered with the seller under the safety clause in an expired listing.

First, the new seller’s agent needs to obtain a copy of the expired listing and any list of prospective buyers registered with the seller. If a safety clause exists and remains effective when the property is relisted, the agent needs to make some business decisions.

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7 Delbon v. Brazil (1955) 134 CA2d 461
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Negotiations conducted by the new agent with these buyers put the seller at risk of liability under the prior broker’s safety clause. Prior to contacting any of these registered buyers, the new agent needs to negotiate a fee-sharing agreement with the prior broker, and then document that arrangement as part of the listing process. [See first tuesday Form 105]

On expiration of a listing, the seller is able to avoid the dual liability situation altogether by relisting with the same broker, rather than listing with another broker, a relisting advantage held by the original broker. The relisting is set up by a modification of the expiration date (and any other terms) of the

fee-sharing agreement
An agreement, written or oral, between different brokerage operations to share fees earned on a transaction which are typically paid by the property owner.
listing. Modification eliminates the need to register prospective buyers until the listing expires under the extension. [See Form 120 accompanying this chapter]

Re-listing with the same broker also preserves the efforts of the seller’s agent spent educating the seller, compiling information on the property and marketing the property.

Sellers often confuse the workings of the safety clause with the open-listing or full-listing-offer theories of procuring cause. A broker is the procuring cause of a buyer and entitled to a fee when the broker holds an open listing and they or their agent is either:

- the direct cause of a sale to a buyer; or
- the cause of a series of events which result in a sale to the buyer.

Consider a broker who enters into an employment agreement with a lender to locate a person to syndicate the purchase of mortgages warehoused by the lender, a process called securitization.

The agreement contains a fee provision calling for payment of a fee only if the broker or their agent initiates a transaction which is successfully completed. The agreement also contains a ten-year safety clause.

On expiration of the listing, the broker’s agent hands the lender a list of several securities firms who create or represent mortgage investment pools that purchase mortgages in the secondary money market. None of the investment firms listed as prospective buyers enter into negotiations with the agent, much less complete a transaction with the lender which was initiated by the agent.

Later, an investment firm registered by the agent buys mortgages from the lender.

The agent’s broker discovers the transaction and demands a fee from the lender. The broker claims they are entitled to a fee since their agent introduced the lender to the firm which eventually purchased the mortgages within the ten-year safety period.

The lender claims the broker is not entitled to a fee since the broker was hired to initiate and complete a successful transaction, and they did not do so by merely registering the names of investment firms.

Is the broker entitled to a fee?

No! The broker is not entitled to a fee for merely registering the names of firms which the agent knew bought mortgages. The fee provision required the broker or their agent to be the procuring cause of a sale, not just naming, soliciting or negotiating with prospective buyers. Payment of a fee is contingent on the broker’s initiation of a transaction which is successfully completed.8

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8 Hedging Concepts, Inc. v. First Alliance Mortgage Company (1996) 41 CA4th 1410
A fee agreement calling for a broker to be paid only if they are the *procuring cause* of the sale *automatically voids* any safety clause contained in the fee provision of a listing agreement. Thus, a safety clause and a procuring cause clause are inconsistent provisions — one or the other for recovery of a fee, but not both in the same document.9

Now consider a seller who employs a broker under a listing agreement which entitles the broker to a fee if they locate a buyer who eventually acquires the property.

During the listing, the seller’s broker or their agent has contact with a buyer resulting in the delivery of information on the listed property. The buyer has difficulty arranging purchase-assist financing. After several discussions, the seller’s agent no longer follows up on the buyer and they engage in no further negotiations.

On expiration of the listing, the property remains unsold. Three months later, the seller contacts the buyer to see if they are still interested in purchasing the property. Negotiations are resumed when the buyer ultimately arranges financing and is able to acquire the property.

On the agent’s discovery of the sale, their broker makes a demand on the seller for a fee. The broker claims they were the procuring cause of the sale since they presented the property to a buyer who remained interested in the property and eventually purchased it when financing became available.

The seller claims the broker is not entitled to a fee since the buyer acquired the property through negotiations commenced by the seller after the listing expired.

Here, the broker is entitled to a fee since they were the *procuring cause* of the sale. The broker’s contact with the buyer *set into motion* an uninterrupted chain or series of events, separated only by time, which eventually resulted in a sale.10

*Editor’s note — By including safety clauses in listing agreements and registering prospective buyers, this type of dispute is avoided.*

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9 Delbon, supra

10 *E. A. Strout Western Realty Agency, Inc. v. Lewis* (1967) 255 CA2d 254
A safety clause in a listing agreement entitles the broker to the agreed fee as earned, when:

- an individual has direct contact with the broker (or their agent) regarding the property during the listing period, called solicitations;
- the broker treats the individual as a prospective buyer due to their inquiries or conduct by handing them a package of information about the property, called negotiations;
- negotiations with the individual terminate without resulting in their entering into an agreement to purchase the property;
- the listing period expires and the broker timely registers the individual by name with the seller as a prospective buyer; and
- the individual and the seller, with or without the broker’s further involvement, later commence negotiations within an agreed to period following the expiration of the listing, called the safety period, and eventually complete a sale of the property.

A safety clause in the fee provision of a listing agreement provides an additional period after the listing period expires for a broker to earn a fee.

Several crucial activities need to be performed by the seller’s agent to perfect the broker’s right to a fee under the safety clause, including:

- providing information about the listed property to any prospective buyers the broker or buyer’s brokers have contact with;
- documenting dealings with prospective buyers by maintaining an File Activity Sheet in a listing file; and
- registering the prospective buyers with the seller on termination of the listing by providing the seller with a List of Prospective Buyers in a timely manner (e.g., within 21 days).

When registering prospective buyers with the seller, the broker whose listing contains a broker cooperation provision needs to include any buyers with whom buyer’s brokers dealt. If a sale covered by the safety clause occurs, both brokers are protected and will share the fee.

The degree of involvement a broker or their agents needs to have with a buyer during the listing period in order to qualify the buyer as a prospective buyer is set by the terms of the safety clause.

At the very least, a seller’s broker or their agent is required to provide the buyer with information regarding the property to qualify as having commenced negotiations. The agent does not need to produce a written offer from a buyer for the buyer to be a prospective purchaser.

When a seller relists a property for sale with another broker on the expiration of a listing, a properly worded and perfected safety clause
remains enforceable. Thus, a broker or their agent entering into a property listing needs to first inquire into the existence of any unexpired safety clause in a prior listing the seller had on the property with another broker.

A fee agreement calling for a broker to be paid only if they are the procuring cause of the sale automatically voids any safety clause contained in the fee provision of a listing agreement.