



The Hidden Challenge in Non-Circumvention Agreements: Proving Damages

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Non-circumvention agreements are widely used in commercial real estate, finance, brokerage, and advisory relationships. They are designed to protect the party that introduces a business opportunity—such as a lender, investor, borrower, buyer, or tenant—from being cut out of the transaction once the parties have been connected.

While the concept is straightforward, enforcing non-circumvention agreements in court can be surprisingly difficult. The primary challenge is not proving that circumvention occurred—it is proving damages.

For parties relying on these agreements, understanding this evidentiary hurdle is critical.

What Is a Non-Circumvention Agreement?

A non-circumvention agreement generally prohibits one party from bypassing the intermediary who introduced the transaction opportunity. In practice, these agreements appear in a variety of contexts:

- Real estate brokers introducing buyers or capital sources
- Investment bankers or capital advisors sourcing investors or lenders
- [Joint venture](#) partners introducing acquisition opportunities
- Consultants introducing strategic counterparties
- Off-market real estate deal sourcing arrangements

The agreement typically provides that the introducing party will receive a fee, commission, or participation if a transaction occurs with the introduced party.

When the parties later transact directly without involving the intermediary, a breach claim may arise.

But that is where the real legal challenge begins.

Why Proving Damages in Non-Circumvention Agreements Is Difficult

Courts generally require a plaintiff to prove damages with reasonable certainty. In non-circumvention cases, that requirement often becomes the central obstacle.

No Guaranteed Transaction Outcome

Most introductions never result in a completed deal. Even where circumvention is alleged, the defendant may argue:

- The transaction might never have closed with the intermediary involved
- The intermediary did not add meaningful value beyond the introduction
- The parties would have found each other anyway
- The intermediary did not have an exclusive right to the opportunity

As a result, courts frequently scrutinize whether the intermediary actually lost something of measurable value.

The “Speculative Fee” Problem

In many cases, the alleged damages are a hypothetical commission or advisory fee that the intermediary claims it would have earned.

Courts are often reluctant to award damages where:

- The fee was never firmly agreed upon
- The scope of services was not defined
- The intermediary had no written engagement agreement
- The fee depended on future negotiations

Without a clearly defined fee structure, damages can appear speculative.

Causation Challenges in Non-Circumvention Claims

Even where a transaction ultimately closes between the introduced parties, defendants frequently argue that the intermediary was not the procuring cause of the deal.

Common defenses include:

- The intermediary’s role ended after the initial introduction
- The transaction occurred months or years later
- Substantial new negotiations or structures were developed independently
- The intermediary was not involved in closing the deal

Courts may therefore question whether the intermediary actually caused the transaction that

produced the alleged damages.

Difficulty Quantifying Lost Opportunities

Some non-circumvention agreements do not guarantee a commission but instead protect a broader participation right—such as a right to:

- Co-invest
- Arrange financing
- Participate in a development
- Provide services

When those rights are bypassed, the damages can be even harder to quantify because they may involve:

- Lost investment returns
- Lost advisory fees
- Lost future business relationships

These losses can be difficult to prove with sufficient certainty to satisfy legal standards.

Contract Drafting Strategies to Reduce Non-Circumvention Risk

Because damages can be difficult to prove after the fact, careful drafting at the outset is critical.

[Well-structured non-circumvention agreements](#) often include:

Liquidated Damages Provisions

A liquidated damages clause can specify a predetermined fee if circumvention occurs—for example:

- A fixed percentage of the transaction value
- A multiple of a defined advisory fee
- A stated dollar amount

If drafted properly, such provisions may avoid disputes over speculative damages.

Clear Fee Definitions

The agreement should clearly define:

- The fee payable if a transaction occurs
- The types of transactions covered
- The duration of protection
- Whether the intermediary must remain involved

Specificity significantly improves enforceability.

Broad Transaction Definitions

Circumvention disputes often arise when the parties structure a transaction slightly differently to avoid paying the intermediary.

Agreements should therefore cover:

- Direct or indirect transactions
- Affiliates of the introduced parties
- [Asset purchases](#), equity purchases, joint ventures, financings, and recapitalizations

Tail Periods

Many agreements include a tail period (often 12–24 months) during which the intermediary is entitled to compensation if the parties transact after the introduction.

Without such a provision, parties may simply wait until the relationship expires.

Practical Takeaways

Non-circumvention agreements remain an important protection tool for intermediaries, advisors, and deal originators. However, their effectiveness depends heavily on careful drafting.

Even when circumvention appears obvious, plaintiffs often face significant hurdles proving damages in litigation.

For that reason:

- Intermediaries should insist on clear compensation terms.
- Transaction definitions should be drafted broadly.
- Liquidated damages provisions should be considered where appropriate.

In the absence of these protections, a non-circumvention agreement may provide far less leverage than parties expect when disputes arise.

Frequently Asked Questions

What is a non-circumvention agreement?

A non-circumvention agreement restricts a party from bypassing an intermediary who introduced a business opportunity and engaging directly with the introduced party.

Why are damages difficult to prove in non-circumvention cases?

Damages are often based on hypothetical fees or lost opportunities, which courts may view as speculative without clear contractual terms.

Do courts require a completed transaction to award damages?

Not necessarily, but the absence of a completed transaction can make it harder to demonstrate measurable loss.

What is the “procuring cause” issue in these disputes?

It refers to whether the intermediary’s efforts were sufficiently connected to the final transaction to justify compensation.

Can a liquidated damages clause help?

In some cases, a properly drafted liquidated damages provision can reduce disputes over whether damages are speculative.

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