

Seller's Indemnity under Listing Agreement



By Brian Madigan LL.B.

You may wish to consider the Seller's obligations to indemnify under the standard form Listing agreement prepared by the Ontario Real Estate Association (OREA).

Here's what the clause looks like:

"8. INDEMNIFICATION: *The Seller will not hold the Listing Brokerage responsible for any loss or damage to the Property or contents occurring during the term of this Agreement caused by the Listing Brokerage or anyone else by any means, including theft, fire or vandalism, other than by the Listing Brokerage's gross negligence or wilful act. The Seller agrees to indemnify and save harmless the Listing Brokerage and any co-operating brokerage from any liability, claim, loss, cost, damage or injury, including but not limited to loss of the commission payable under this Agreement, caused or contributed to by the breach of any warranty or representation made by the Seller in this Agreement or the accompanying data form."*

Unlike the Indemnification clause contained in the Buyer Representation Agreement (BRA), this particular paragraph really does contain an indemnity.

Reasonably, the paragraph can be broken into two parts: a disclaimer, and an indemnity.

The Disclaimer

Let's look at this statement in more detail:

- The Seller will not hold the Listing Brokerage responsible (*this is a disclaimer or limitation on liability*)

- for any loss or damage to the Property or contents
(note: there is no reference to personal injury)
- occurring during the term of this Agreement
(this is the listing agreement period and does not include the additional holdover period)
- caused by the Listing Brokerage or anyone else
(this refers to obviously everyone in the entire world)
- by any means, including theft, fire or vandalism, other than by the Listing Brokerage's gross negligence or wilful act.
(and the cause is irrelevant, with the notable exception of a wilful act or gross negligence)

I should make it clear that the term gross negligence likely has no meaning in law in this context. Ordinary negligence probably means the same thing as gross negligence.

So, the listing Brokerage is not responsible for people setting fires. That's probably reasonable. But, it is also unlikely. What's more important is the matter of theft. This is far more likely to occur and a much more difficult problem. How can the agent ensure that no one takes anything? This is almost impossible! Thieves can be very clever.

The Indemnification

This paragraph actually includes an Indemnity, which we can break down as follows:

- 1) **Indemnity:** The Seller agrees to indemnify and save harmless
- 2) **Who:** the Listing Brokerage and any co-operating brokerage
- 3) **From What:** from any liability, claim, loss, cost, damage or injury,
- 4) **Commission Included:** including but not limited to loss of the commission payable under this Agreement,
- 5) **Triggering Event:** caused or contributed to by the breach of any warranty or representation made by the Seller in this Agreement or the accompanying data form.

So, this statement truly is an indemnity. It operates in favour of the brokerage and any co-operating brokerage. That means everyone else on the MLS system or

any brokerage which might participate in a transaction.

There must first be a loss to either the brokerage or the co-operating brokerage before this statement will become operative. It covers any liability, as well as other claims etc. Notably it does not mention judgments, orders, pre-judgment and post-judgment interest which are usually mentioned in this type of provision.

More specifically, if for some reason the commission is lost, then this statement will come into play.

The triggering event before the seller will incur liability is a direct or indirect causal relationship between the loss and a breach of either a warranty or representation made by the seller. However, that breach relates specifically to this Agreement (meaning the listing agreement) and the data form which sets out details about the property.

Now, you might think that the two most likely causes of a breach in a transaction would arise out of the Agreement of Purchase and Sale, or the Seller Property Information Statement (SPIS) and you would be right.

The problem, at least, for the two brokerages that might seek to benefit from the terms of this provision is that both such documents are not mentioned.

In terms of legal interpretation, the “contra proferendum” rule would apply. That means that any ambiguity or uncertainty in a document will be construed as against the interest of the person who drafted the document. A Court would be unlikely to extend the meaning to include the agreement of purchase and sale and the SPIS when they were omitted. That’s interesting! Obviously, there should be a better indemnification provision from the perspective of the brokerages. This particular one contains some rather large holes. Oh, well, litigation is probably too expensive anyways! But, the point of this is that if you are going to have an indemnity clause, you should have a good one.

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