

## RESPONSIBILITY FOR THE SELLER'S PROPERTY

**I. Just as it is impossible to show a home without showing it; it is impossible to permit the showing of a seller's home without a risk that the seller's personal property could be damaged or stolen.**

**II. Consider the following scenarios:**

A. In Maryland, someone robbed a home after receiving the lockbox code by calling the listing office and pretending to be an agent affiliated with a well-known firm who wanted to show the home to a potential buyer. The listing office made no effort to verify the identity of the caller prior to giving out the lockbox code. *Adloo v. H.T. Brown Real Estate, Inc.*, 686 A.2d. 298 (Md. 1996).

B. In Ohio, an arsonist gained entry to a home causing almost \$200,000 in damage. While it was not obvious exactly how the arsonist had gained access to the home, the listing agent admitted that he had given a prospective purchaser a key so that the purchaser could view the home on his own. Moreover, the prospective purchaser had been allowed to keep the key for ten days. *Pandey v Banachowski*, (2011 WL 6932353).

C. In a circuit court action in Michigan, a seller alleged that a robbery of his home had occurred as a result of the listing agent's assistant's failure to activate the home's alarm system after a showing.

1. In each of these scenarios, a strong argument can be made that the listing agent was negligent and/or breached his or her duty of care. In each of these situations, if the agent is found to have been negligent then the firm will be liable as well.

**III. Protecting the listing firm/agent**

A. Include an indemnification provision in all listing agreement forms:

1. A sample (from MR's form) listing agreement:

**INDEMNIFICATION:** Seller shall indemnify and hold harmless Broker and Broker's Agents and Subagents from any and all liability for any reason as a result of injury to person(s) or damage or loss to property arising out of showing of Seller's home pursuant to the Listing. If the Property becomes vacant during this Listing, Seller should notify Seller's casualty insurance company. Broker is not responsible for the security of the Property nor for inspecting the Property on a periodic basis.

B. Release clauses like this have been upheld in Michigan, however:

1. The release must be unambiguous and express a clear intent to protect a party from his or her own negligent acts. *Xu v Gay*, 257 Mich App 263 (2003).

2. The release must be fairly and knowingly made. A release is knowingly made even if it is not labeled a release, or if the releaser fails to read its terms, or thought the terms were different, absent fraud or intentional misrepresentation designed to induce the releaser to sign the release through a strategy of trickery.

3. Release clauses will only protect the listing firm from claims based on ordinary negligence, not against gross negligence or intentional misconduct on part of the agent.

- (a) “Gross negligence” is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.
- (b) If reasonable minds could differ as to whether the conduct was sufficiently reckless then the question is one for a jury to decide.