

Residential Real Estate Appraising: “Hot” Legal Issues

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Speaker Information



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LIA provides insurance and bond products to appraisers, appraisal firms and management companies in all 50 states. As general counsel, Peter assists and advises LIA's 20,000+ insureds with regard to liability threats, lawsuits, and administrative complaints and discipline. He graduated with a law degree from the University of California at Berkeley (Boalt Hall School of Law) in 1993 and previously worked for the law firms Latham & Watkins LLP and Irell & Manella LLP in Orange County, California.



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What Are We Going to Talk About?

- ✓ Introduction to appraisal professional negligence concepts
- ✓ How residential appraisers can build in some key language based on recent case law
- ✓ The single most common alleged error that results in claims
- ✓ Hybrid appraisal concerns



Let's Consider a Real Appraiser Claim Situation

- Review appraiser retained by lender prepares review that is highly critical of another appraiser's work and also opines to a significantly lower value.
- Lender drops the appraiser from its appraiser panel, costing the appraiser tens of thousands of dollars in lost work. Other lenders learn of the "blacklisting" and more work is lost.
- Reviewer on his own reports the appraiser to the state for USPAP violations and submits the review. However, the state finds no errors and actually disciplines the reviewer for a poorly supported review.
- In sum, the reviewer's review failed to meet the standard of care.
- Can the damaged appraiser who lost tens of thousands in income because of the deficient review sue the reviewer for professional negligence?

What Is a Professional Negligence Claim?

The key legal elements of a negligence claim:

- Duty owed by the defendant *to the plaintiff* to conform his or her conduct to a standard of care.
- Breach of that duty – e.g., providing an inflated valuation or failing to produce a USPAP-compliant appraisal.
- Reliance by the plaintiff.
- Actual damages to the plaintiff.

So a Very Key Issue is: To Whom Does the Appraiser Owe a Legal Duty?

Law in most states:

a professional like an appraiser owes a legal duty to those parties they know or reasonably expect will use or rely on their work.

Who Sues Residential Appraisers Over Appraisals for Loans?

Most common:

- Borrowers/purchasers (>60%)
- Lenders/mortgage investors
- Property sellers

Less common:

- Very few AMCs



Key Recent Commercial Appraisal Case

Willemssen – CA Court of Appeal (2014)

- Willemssen contracted to purchase 4.8 acre vacant land in San Bernardino County in 2007.
- Purchase price \$1.6m.
- F&M Bank hired appraisers.
- Appraisers valued property at \$1.78m.
- Several years later, Willemssen was unhappy with purchase and sued.
- Alleged value inflated because appraisers failed to consider impact of earthquake fault and easement.
- But the appraisal had some key language:

Key Recent Commercial Appraisal Case *Willemssen* – CA Court of Appeal (2014)

report stated: “The function of this appraisal report is to provide Farmers and Merchants Bank with a Summary Appraisal Report.” It further stated: “The intended use of this appraisal is to assist Farmers and Merchants Bank in analyzing a new loan for the subject property. The intended users of this appraisal are Farmers and Merchants Bank and/or its designated representatives.” Another portion of the report said: “The report may not be used for any purpose by any person other [than] the party to whom it is addressed without the written consent of the appraiser and the appraiser specifically disclaims any liability to such unauthorized third parties.” The appraisal report was addressed to the bank.

Key Recent Commercial Appraisal Case

Willemssen – CA Court of Appeal (2014)

- Trial court granted summary judgment and dismissed case.
- Court of appeal affirmed. Key finding:

“[The appraisers] did not manifest an intent to supply information for Willemssen's use in determining whether the property was suitable for his purposes. Rather, the appraisal report specifically limited its intended use to the use of the bank.”

What Can Residential Appraisers Do?

- The 1004 appraisal form has some problems – key among them is certification #23:

23. The borrower, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.

- Appraisal contingency in a purchase agreement can be a further negative.
- What can you do?

What Can Residential Appraisers Do?

Include a specific advisory in reports directed to purchasers/borrowers and sellers. Example:

The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal and no such party should use or rely on this appraisal for any purpose. Such parties are advised to obtain an appraisal from an appraiser of their own choosing if they require an appraisal for their own use. This appraisal report should not serve as the basis for any property purchase decision or any appraisal contingency in a purchase agreement relating to the property.

Hot Topic: Square Footage Claims

- Number #1 actual specific error resulting in claims:
 - Get the measurement right
 - Double check your calculations and sketches
 - Proof for typos
 - Don't trust borrowers, sellers, MLS, public records
 - Use plain English for special situations:

Example language: Appraiser notes that public building records, tax records and information supplied by the owner differ with respect to the square footage of the building structure. Floor plan is unique and difficult to measure. Appraiser's measurement is approximate.



What Should the Appraiser Say About This?



Hybrid Valuations

- Appraisals that combine appraiser's valuation analysis with another party's inspection and/or with AVMs or automated tools.
- Main liability concerns:
 - Appraiser (and AMC) may be dragged into claim – typically by borrower – based on information supplied by the other parties.
 - Clarity of who provides and is responsible for particular information alleviates *some* – but far from all – of the risk.



Hybrid Valuations

- Main liability concerns (cont'd):
 - Some of the new products are missing liability prevention ingredients. Key examples:
 - No statements that the report is not a home inspection.
 - Weak wording on intended use and intended user.
 - The worst forms just copy 1004 language.
 - As a general matter, the form designers don't take advantage of their freedom from the 1004 – they are not doing a good job in reducing potential liability not only for the appraiser, but also for their own companies and inspectors.



Hybrid Valuations

- **Main liability concerns (cont'd):**
 - In performing certain hybrid appraisals, appraisers may:
 - Rely too heavily of the automated tools built into the software platforms that create the reports.
 - Fail to create an adequate workfile with the required information and data to support (and perhaps later defend) their appraisal.
 - As far as liability and disciplinary risk, there is a big distinction between a hybrid valuation that a consumer may receive a copy of, versus one that will strictly be used internally.



Hybrid Valuations

The question most often posed by appraisers to us (as an E&O provider) about hybrid valuations:

➤ “Am I covered by my policy for doing them?”



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Example Hybrid Valuation

APPRAISAL™

SUBJECT - SINGLE FAMILY HOME - 3BD / 2BA
411 S Schug St, Orange CA 92869

FILE NUMBER
#141110-2447-1

CLIENT FILE ID#
#7891665314-515

Appraisal Report

Report Summary

OPINION OF MARKET VALUE

\$651,000

1 YR RISK OF DECLINE - **FORECAST**

5.7% Very Low Risk



EXTERIOR PROPERTY CONDITIONS

Inspection provided by



C6

C5

C4

C3

C2

C1

Major Repairs
Required

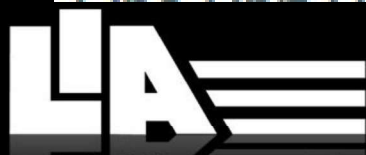
Repairs
Needed

Worn but
Adequate

**Well
Maintained**

Like New

New



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Hybrid Appraisals

- Always pay close attention to intended user and intended use language.
- Don't trust form language.

APPRAISAL™

SUBJECT - SINGLE FAMILY HOME - 3BD / 2BA
411 S Schug St, Orange CA 92869

FILE NUMBER
#141110-2447-1

CLIENT FILE ID#
#7891665314-515

INTENDED USER

The intended user of this report is the named Lender/Client. In some jurisdictions, e.g. Illinois, the AMC is considered an intended user.

Better to say: The intended user of this report is the named Lender/Client. Use of this report by other parties is not intended or authorized by the appraiser. No other parties should use or rely on the appraisal for any purpose.

INTENDED USE

The intended use of this appraisal report is to provide an opinion of the MARKET VALUE of the real property that is the subject of this report based on a sales comparison analysis, for the purposes as defined in this report.

Better to say: The intended use of this appraisal is for the named Lender/Client's evaluation of the subject property as collateral for a mortgage loan to the borrower identified in the report. No other use is intended or authorized by the appraiser.

Two Lessons from Some Bad Internet “Legal” Advice

Yesterday at 12:28pm · Frankfort Square, IL · [Avatar]

Anyone have experience with that Llano company trying to come after you for an old appraisal completed? I have a buddy who is no longer in the business getting letters from them on something he completed as an associate in late 2007.



Just tell him to tell them he burned the files a few years back and have no idea what they are talking about? If they want a new appraisal, maybe he can recommend you but do you really want to hear from these guys years from now on an old report?

Like · Reply · 1 · Yesterday at 12:45pm



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