

Appraiser Law in the Real World: Key Laws, Professional Liability and a Little Bias

Real Estate Appraiser Continuing Education

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About Your Instructor

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Attorney-Principal



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I'm an attorney. For 18 years, my legal practice has been entirely focused on valuation services. My clients have primarily been appraisal firms, AMCs and financial institutions. I now serve as general counsel to BBG, Inc., a national commercial appraisal firm.

My book ***Risk Management for Real Estate Appraisers and Appraisal Firms*** was published by the Appraisal Institute in 2019.

I live in Bozeman, MT, and I represent the public on the Montana Board of Real Estate Appraisers.

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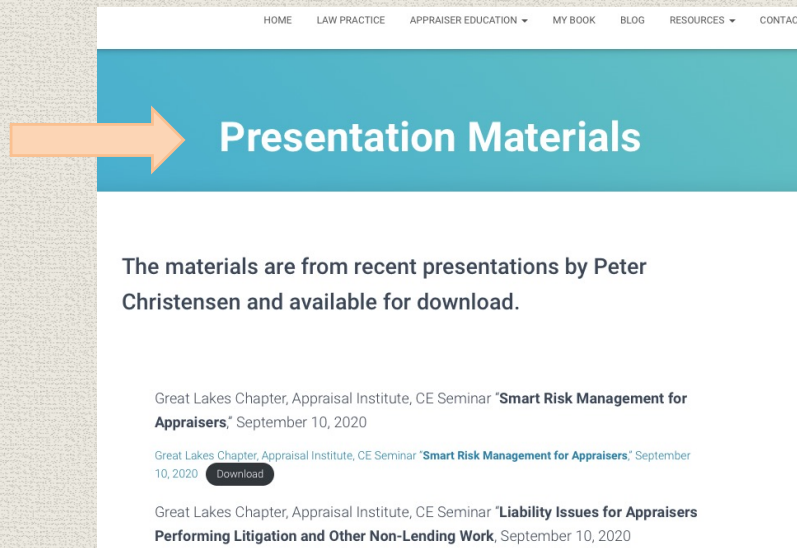
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Our roadmap – where are we going?

- We're going to look at a number of legal situations involving appraisers and appraisal firms and see what we can learn from each of them.
- The focus is on appraisal work for lending purposes.
- Along the way, we'll also look at some key laws that appraisers often have questions about and should know.

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www.valuationlegal.com under Resources tab



HOME LAW PRACTICE APPRAISER EDUCATION MY BOOK BLOG RESOURCES CONTACT

Presentation Materials

The materials are from recent presentations by Peter Christensen and available for download.

Great Lakes Chapter, Appraisal Institute, CE Seminar "Smart Risk Management for Appraisers," September 10, 2020

Great Lakes Chapter, Appraisal Institute, CE Seminar "Smart Risk Management for Appraisers," September 10, 2020 [Download](#)

Great Lakes Chapter, Appraisal Institute, CE Seminar "Liability Issues for Appraisers Performing Litigation and Other Non-Lending Work," September 10, 2020

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The Basic Elements of an Appraiser Negligence Claim – Where Does USPAP Fit In?

- The Uniform Standards of Professional Appraisal Practice (USPAP), of course, are the standards that appraisers are required to follow when performing appraisal assignments (with some exceptions in some states).
- USPAP has the force of law and regulation for appraisers under state appraiser licensing laws.
- It's also very relevant to some of the legal situations we'll been talking about – where an appraiser is being accused of professional negligence.
- USPAP forms a large part of what is called the "**standard of care.**"
- And, as we'll see, the USPAP concepts of "intended use" and "intended user" also largely define who can sue an appraiser.

What Is a Professional Negligence Claim?

The key legal elements of an appraisal negligence claim are:

- 1) a **legal duty** owed to the plaintiff by the defendant appraiser,
- 2) failure of the defendant appraiser to follow the applicable **standard of care** required for the assignment,
- 3) reliance by the plaintiff on the appraisal work, and
- 4) damages to the plaintiff proximately caused by the appraiser's breach of the standard of care.

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The Overarching Key Issue in a Majority of Cases: To Whom Does the Appraiser Owe a Legal Duty?

Law in most states:

a professional like an appraiser owes a legal duty for the purpose of negligence claim to their client and to those additional parties they know or reasonably expect will use or rely on their work.

Let's now see how that works in a real case.

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Recent Commercial Appraiser Liability Case: RockRock Group v. Value Logic, WA Court of Appeals Opinion Published July 7, 2016

- In mid-2006, a real estate developer had two adjacent properties near Spokane under contract for \$475,000 and \$300,000.
- One property was 51 acres; the other was 39 acres.
- Both were zoned partially "light industrial" and partially "rural traditional" (a classification permitting minimal use).
- The developer was seeking to flip the properties to other investors.
- LLCs were formed through which the purchases would be made with financing from RiverBank.
- RiverBank engaged Value Logic to appraise the properties – the fees paid were \$3,000 and \$2,000.
- The appraisals, delivered in October 2006, valued the properties at **\$4,500,000** and **\$4,250,000**.

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**RockRock Group v. Value Logic, WA Court of Appeal
Opinion Published July 7, 2016**

- **The reports contained the following limitations:**

This report is prepared for the sole use and benefit of the client
Neither this report, nor any of the information contained herein shall be used or relied upon for any purpose by any person or entity other than the client. The appraiser is not responsible for the unauthorized use of this report.

The liability of [Value Logic] is limited to the client only and only up to the amount of the fee actually received for the assignment. Further, there is no accountability, obligation, or liability to any third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions.

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**RockRock Group v. Value Logic, WA Court of Appeal
Opinion Published July 7, 2016**

- **The reports contained the following limitations:**

Without prior written approval from the author, the use of this report is limited to internal decision making and financing. All other uses are expressly prohibited. Reliance on this report by anyone other than the client, [or] for a purpose not set forth above, is prohibited. The author's responsibility is limited to the client.

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RockRock Group v. Value Logic, WA Court of Appeal Opinion Published July 7, 2016

- The developer received copies of the appraisals and showed them to prospective investors.
- Some of the investors received copies.
- The developer's pitch was that the investor LLCs would be able to flip their interests quickly – the investors purportedly did not know that the developer had the properties under contract for far less than they were paying.
- Statements were made by the developer to investors such as: *"with the appraisals I got . . . an idiot could get into these properties and make a quarter million dollars."*

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RockRock Group v. Value Logic, WA Court of Appeal Opinion Published July 7, 2016

- The investor LLCs – one named RockRock Group and the other RussellRock Group – purchased 75% interests in the properties.
- RockRock paid \$1.8m for its interest in the 53-acre property; RussellRock paid \$1.63m for its interest in the smaller property.
- RiverBank financed the purchases based on the appraisals and with personal guarantees from the investors in each LLC.
- After acquiring their interests, RockRock and RussellRock were not successful in re-flipping the properties themselves. The market tanked almost immediately after the purchases were complete.
- In 2009, payments came due on the loans, defaults occurred, and the investors were called on their guarantees.

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RockRock Group v. Value Logic, WA Court of Appeal Opinion Published July 7, 2016

- In 2009, a review appraiser for the bank found the original appraiser had overvalued the properties by applying a value per square to the entire properties based on “light commercial” zoning.
- Another appraiser valued the properties at \$1,220,000 and \$520,000.
- In 2011, RockRock and RussellRock sued Value Logic, LLC and its two appraisers.
- The gravamen of the complaint was that Value Logic negligently overvalued the properties in 2006 and that the LLCs would not have completed the purchases but for the overstated values.
- The primary theory was **negligence**.
- The damages demanded by the plaintiffs exceeded \$5,000,000.

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RockRock Group v. Value Logic, WA Court of Appeal Opinion Published July 7, 2016

- Value Logic moved for summary judgment, which was **granted** by the trial court on the basis that Value Logic did not owe the investors a legal duty. The WA Court of Appeals affirmed the judgment.
- Why? That good language in the appraisal reports (not contradicted by anything in the engagement agreements or by other evidence).

██████████ as evidenced by the reports, Value Logic did not intend for anyone other than RiverBank to be guided by the reports—the reports define RiverBank as the client, state they were prepared for RiverBank’s sole use and benefit, prohibit any person other than RiverBank from using or relying on them, and state the appraisals were confidential between Value Logic and RiverBank.

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The Rulings Point to the Key to Winning a Majority of Negligence Cases

Using precise, narrow descriptions of intended use and user.

For example, **never** describe intended use like this:

The intended use of this appraisal report is to provide an opinion of market value of the real property that is the subject of this report.

Or this:

Intended use: for internal decision-making.

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That Ruling Points to the Key to Winning a Majority of Negligence Cases

Say something like this:

The intended user of this appraisal is solely the lender/client named in this report. This appraisal has been prepared for the sole use and benefit of only that client. No other users are intended, and no other party should use or rely on the appraisal or any content in this report for any purpose.

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 appraisal should not be used or relied on for any other purpose.

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What's the "Biggest" Appraiser Liability Case in the History of the Universe? How Did it Resolve?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

L.J. GIBSON, BEAU BLIXSETH; AMY KOENIG, DEAN FRESONKE, VERN JENNINGS, TERRI FROELICH, MONIQUE LEFLEUR, and GRIFFEN DEVELOPMENT, LLC, each individually, and on behalf of PROPOSED Plaintiff CLASS Members of Tamarack Resort, Yellowstone Club, Lake Las Vegas and Ginn Sur Mer,

Plaintiffs,

v.

CREDIT SUISSE AG, a Swiss corporation;
CREDIT SUISSE SECURITIES (USA), LLC, a Delaware limited liability company,
CREDIT SUISSE FIRST BOSTON, a Delaware limited liability corporation;
CREDIT SUISSE CAYMAN ISLAND BRANCH, an entity of unknown type;
CUSHMAN & WAKEFIELD, INC., a Delaware corporation and DOES 1 through 100 inclusive,

Case No. 1:10-cv-00001-EJL

FIRST AMENDED COMPLAINT

1. Racketeer Influenced and Corrupt Organizations Act;
2. Fraud;
3. Negligent Misrepresentation;
4. Breach of Fiduciary Duty;
5. Tortious Interference with Contractual Relations;
6. Unjust Enrichment; and
7. Negligence.
8. Common Law Conspiracy

JURY TRIAL DEMANDED



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What's the "Biggest" Appraiser Liability Case in the History of the Universe? How Did it Resolve?

Each report stated:

- (1) the intended use of the appraisal is "to assist in internal decision-making purposes regarding potential financing," and
- (2) "intended for use only by the client [Credit Suisse]."

➤ Ruling on negligence claim:

"the court finds neither FIRREA nor USPAP imposed a duty of care on Defendants in favor of Plaintiffs."

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The Appraiser's Most Common Actual Mistake

The next case relates to a legal claim by a residential borrower in relation to an appraisal reported on the 1004 form. Let's keep this language from the form in mind as we look at the case:

INTENDED USE: The intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction.

INTENDED USER: The intended user of this appraisal report is the lender/client.

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.

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Most Common Mistake: Miami Appraiser Sued - The House is Not as Big as He Reported (Filed June 5, 2020)



10. On or about May 23, 2018, the [REDACTED] entered into an "AS IS" Residential Contract For Sale And Purchase ("Contract") for the Property with a sales price of \$675,000.00

13. The Contract also contained an appraisal contingency, which provided, in pertinent part, that in the event the Property was appraised for less than \$650,000.00, the [REDACTED] could terminate the Contract, have any paid deposits returned, and be free from any obligations under the Contract ("Appraisal Contingency").

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**Most Common Mistake:
Miami Appraiser Sued - The
House is Not as Big as He
Reported
(Filed June 5, 2020)**



18. On June 12, 2018, Mr. [REDACTED] issued a Uniform Residential Appraisal Report, which appraised the Property as of June 7, 2018 (“Negligent Appraisal”). A true and correct copy of the Negligent Appraisal is attached hereto as Exhibit “B.”

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20. Of significance, the Negligent Appraisal notes that Mr. [REDACTED], and thus [REDACTED], were aware of and had reviewed the Contract, and further provides that the [REDACTED] could rely on the appraisal in connection with their mortgage loan. *See* Exhibit “B.”

21. The Defendants thus either knew or should have known about the Financing Contingency and the Appraisal Contingency, and that the [REDACTED] would rely, and were allowed to rely, on the Negligent Appraisal in connection with same.

22. The Negligent Appraisal valued the Property at \$678,000.00 (“Negligent Valuation”).

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.

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23. The Negligent Valuation was predicated on Mr. ██████'s opinion that the Property was worth \$411.59 per square foot of living area and had a living area of approximately 1,640 square feet. *See* Exhibit "B."¹

25. Relying on the Negligent Appraisal, the ██████ took out a mortgage loan from the Bank for \$540,000.00,² closed on the Contract, and acquired the Property.

26. Unfortunately and unbeknownst to the ██████, Mr. ██████, and by extension ██████, had committed an error in the Negligent Appraisal.

27. Contrary to the Negligent Appraisal, the Property's approximate living area was not 1,640 square feet.

Public Records		×
Beds	3	
Baths	2	
Sq. Ft.	1,394	
Stories	1	
Lot Size	7,850 Sq. Ft.	
Style	Single Family Residential	
Year Built	1938	
Year Renovated	2003	

PROPERTY DETAILS	
INTERIOR	EXTERIOR
1,692 Sq Ft.	.18 Acres
PROPERTY TYPE	MONTHLY REAL ESTATE TAX
Single Family Home	\$315
YEAR BUILT	MLS/LISTING ID
1938	A10436499

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Most Common Mistake: Miami Appraiser Sued The House is Not as Big as He Reported



28. Instead, the Property's approximate living area was 1,394 square feet.

29. Had Mr. ██████ applied his \$411.59 per square foot of living area formula to the Property's true living area of approximately 1,394 square feet, the Negligent Appraisal would have valued the Property at approximately \$573,000.00 ("Correct Valuation").³

30. The Defendants thus overvalued the Property *by more than \$100,000.00*.⁴

¹ 1,640 square feet * \$411/59 square foot = \$675,007.60 = ~ \$675,000.00.

³ 1,394 square feet * \$411/59 square foot = \$573,756.46 = ~ \$573,000.00.

⁴ \$675,000.00 - \$573,000.00 = \$102,000.00 = > \$100,000.00.

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Most Common Mistake: Miami Appraiser Sued The House is Not as Big as He Reported

What happened in the case?

Takeaways:

- Square footage errors are the single-most common actual mistakes for which appraisers are sued.
- Pay extra attention to measuring and reporting square footage.

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More Takeaways – Mitigating the Risk of Borrower Claims with Specific Additional Language

Takeaways:

- Borrowers are the most common claimants.
- Use additional language in reports directed at claims by borrowers (and sellers).

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Suggested Language for for Residential Appraisers Regarding the 1004 and Similar Report Forms?

Key language for residential lending appraisal reports:

The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal, and no such party should use 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. Any reference to or use of this appraisal report by a purchaser, borrower or seller for their own purposes, including without limitation for the purposes of a property purchase decision or an appraisal contingency in a purchase agreement, is at such party's own risk and is not intended or authorized by the appraiser.

Even though appraisal forms contain some similar language, it's proven that having it written out separately is most effective.

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The Most Common Bases of Legal Claims Against Appraisers

The most common *alleged* mistakes at the core of professional liability lawsuits concerning appraisals for mortgage lending (either residential or commercial) are:

1. **Value.** The appraiser's opinion of value allegedly was too high or too low because the appraiser used incorrect information about the subject property, selected inappropriate comparable sales or made inappropriate adjustments.

20. Upon review of Defendants' appraisal by a Certified Appraiser following the sale of the Property, Plaintiff determined that, among various errors and omissions, Defendants incorrectly used improper sales comparables that were locationally, functionally, and dissimilar to the Property, which resulted in a gross over valuation of the Property.

2. **Measurement.** The appraiser made an error in determining or reporting the square footage of a structure or the land area of the subject property.

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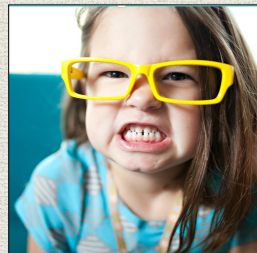
- 3. Property condition/characteristics.** The appraiser failed to discover or report a unique issue or problem with the subject property. The most common alleged issues and problems include:
- The property suffers from a condition problem such as leaky roof, mold, foundation settlement, vermin infestation or unrepaired damage from fire or flood.
 - The appraiser misreported that the property is served by public sewer, when, in fact, the property is served by a septic system (or a pipe running to a creek) and that system has failed.
- 4. Construction progress reports.** In a construction progress report for loan disbursement, the appraiser overstated the degree of completion or failed to identify problems with the construction.

Example language: This construction progress report is for the use and benefit of the lender to assist in making loan disbursements. It is not prepared for the use or benefit of the owner/borrower. The purpose of this inspection is to determine the approximate degree of completion and not the quality of construction, workmanship or materials, or adherence to applicable building or planning codes or requirements.

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Review Appraiser Liability to the Original Appraiser? Let's Apply What We Just Learned to Another Real Appraiser Claim Situation

- Review appraiser retained by lender prepares a review that is highly critical of another appraiser's work.
- Lender drops the appraiser from 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.
- Can the damaged appraiser who lost tens of thousands in income because of the bad review sue the reviewer for professional negligence?



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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- In March 2005, the plaintiff obtained a mortgage loan from BofA to purchase a property on Camano Island in the Puget Sound.
- A staff appraiser employed by LandSafe Appraisal performed the appraisal.



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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- More than three years later, in July 2008, the plaintiff was having problems with the property's waste system and hired a contractor to investigate the issue.
- The contractor determined that the existing septic system was not operable and had not been operable since before 2005.



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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- The system had caused serious damage to the home's foundation.
- The county public health department prohibited any further occupancy of the property until installation of an approved functional septic system and repair of the foundation.
- With repair costs estimated in the hundreds of thousands of dollars, the plaintiff determined that the property was essentially worthless and stopped making payments on the loan.

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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- The borrower then sued the bank and LandSafe Appraisal for negligent misrepresentation and other claims, alleging that the firm's appraiser reported in the appraisal that the property was served by a working septic system and failed to identify or report any deficiency.
- The borrower filed this lawsuit in 2011, about six years after the initial appraisal.

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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- LandSafe Appraisal moved to dismiss the case based on Washington's three-year statute of limitations period.
- The court hearing the motion pointed out that Washington follows the discovery rule and that the statute of limitations begins to run when the plaintiff "discovered or, in the exercise of due diligence, should have discovered the misrepresentation."

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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

- The court ruled that the statute of limitations did not begin to run until June 2008 when the plaintiff first "had a reason to suspect that LandSafe's appraisal was faulty."
 - That date was within three years of when the borrower filed its lawsuit.
 - Accordingly, the motion to dismiss was denied and the case advanced toward trial.
- Takeaways:
1. What's the statute of limitations period for appraiser negligence here in **South Dakota**? Is a discovery rule followed in this state?
 2. Again, borrowers/other third parties are the most common source claims (60-65%).
 3. It sounds silly – but septic/sewer issues are way too common in claims (and mostly preventable).

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South Dakota Statute of Limitations

Codified Laws

Home > Codified Laws > 15 > 2 > 35

Go To:(1-1-1) or Google Search

15-2-35. Action against real estate appraiser or employee for malpractice, error, mistake, or omission.

No action may be brought against a licensed real estate appraiser, or any agent or employee thereof, for malpractice, error, mistake, or omission, whether based upon contract or tort, unless it is commenced within three years of the occurrence of the alleged malpractice, error, mistake, or omission. The term, real estate appraiser, includes any real estate appraiser who is certified, licensed, or registered pursuant to chapter 36-21B. This section is prospective in application.

Source: SL 2007, ch 130, § 1.

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Statute of Limitations + More

Amini v. BAC Home Loans Servicing LP, LandSafe Appraisal Services, Inc. (2012)

That was an expensive septic system issue. Bank of America and LandSafe Appraisal ultimately settled the case with the borrower – by agreeing to forgive the entire \$504,000 balance owed on the mortgage.

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[Statute of Limitations Chart Link](http://www.valuationlegal.com/limitations/) www.valuationlegal.com/limitations/

State	Years	Does a "discovery rule" potentially apply to a professional negligence claim against an appraiser?	Underlying State Statutory Source
Alabama	2	No, unless fraud.	Alabama Code § 6-2-38
Alaska	2	Yes	Alaska Code of Civil Proc. § 09.10.070
Arizona	2	Yes	
Arkansas	3	No. Art. limitations inconstit.	Nebraska 2 Yes Neb. Rev. Stat. § 25-222
California	2	Yes	Nevada 4 Undetermined Nev. Rev. Stat. Ann. § 11.190
Colorado	2	Yes	New Hampshire 3 Yes N.H. Rev. Stat. Ann. § 508:4
Connecticut	2	Yes	New Jersey 6 Yes N.J. Stat. Ann. § 2A:14-1(a)
Delaware	3	Yes	New Mexico 4 Yes N.M. Stat. Ann. § 37-1-4
Florida	2, for claims by clients	Yes, for clients with no	New York 3 No N.Y. Civ. Prac. L. & R. § 214 (6)
Georgia	4	The lit. appliet has no	North Carolina 3 with a 5-year statute of repose Yes; however, North Carolina has adopted a "statute of repose" that imposes a maximum time period on claims. A claim for negligence against an appraiser, even under the discovery rule, must be filed within 5 years of the appraisal. (N.C. Gen. Stat. §1-51(4).) N.C. Gen. Stat. § 1-15 and § 1-52(9)
			North Dakota 2 Yes, within 2 years of discovery up to a maxium of 6 years. N.D. Cent. Code § 28-01-01, et seq.

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Would this Narrative in an Appraisal Report Violate the Federal Fair Housing Act?



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Key Section of Federal Fair Housing Act

“It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” (42 U.S.C. § 3605(a).)



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**How many appraisers
have been sued for
discrimination since
2020?**

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Court Actions Since 2020 Involving Alleged Appraisal Discrimination



FHFA Valuation Modernization Summit



My slide from the FHFA's Summit in Feb. 2024

"Only" 10 Court Cases 2020-24

Beneath the Surface:
 Non-Public Resolutions
 Fair Housing Organization Investigations
 HUD Investigations to be Resolved
 CFPB Investigations

Observations Regarding Court Cases

- 10+/- cases alleging discriminatory appraisals filed since 2020
- 9 name individual appraisers – none of these involve purchase loans
- 1 case is commercial
- 8 cases name lenders, 2 name AMCs
- 3 cases have borrowers representing themselves (pro se)
- 6 cases are still pending, 3 have settled, 1 was dismissed
- 0 have reached any decision on the merits

February 14, 2024 | Washington, D.C.

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Guard Against Improper References in Your Report Avoid this Appraiser's Copy/Paste Mistake

FHFA INSIGHTS Home / Media / Blog / Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary

Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary
 Published: 12/14/2021

Key Takeaways

- Examples of overt references to race, ethnicity, and other prohibited bases under federal fair lending laws in appraisals and other property descriptions persist, indicating the continued presence of valuation bias.
- Ongoing failure to address appraiser consideration of prohibited factors like race, as indicated by prohibited bias commentary within the free-text form fields of appraisals, may result in valuation bias.
- Market participants must ensure that appraisals and other property valuations are compliant with fair lending principles, including in free-form text commentary. Appraisals are to be fair and free of bias, providing a supported value for a family's future or current home that reflects respect and equal treatment of the community and neighborhood in which the home is located.

What We Observed

From millions of appraisals submitted annually, a keyword search resulted in thousands of potential race-related flags. Individual review finds many instances of keywords to be false positives, but the following are examples of references when the appraiser has clearly included race or other protected class references in the appraisal.

The racial and ethnic composition of the neighborhood should never be a factor that influences the value of a family's home. Our observation of appraisals suggests that racial and ethnic compositions of a neighborhood are still sometimes included in commentary, clearly indicating the writer thought it was important to establishing value.

FHFA Study

Examples of problematic words and phrases found in appraisal reports:

"The racial makeup of the city was 86.28% white, 12.46% Black or African-American, 0.52% Native American, 0.22% Asian, and 0.52% from two or more races. 0.56% of the population were Hispanic or Latino of any race."

"Commercial strip featuring storefronts supplying Jewish Households."

A neighborhood described as "predominately Hispanic."

An area that was "originally founded as a whites-only city or sundown town" but had become "fairly diverse" with a "diverse school system."

An area that was "'not especially-diverse' ethnically, with a high percentage of white people."

A reference to a neighborhood being originally "White-Only," before becoming a "White-Flight Red-Zone" to explain why the neighborhood is mostly "Working-Class Black" now.

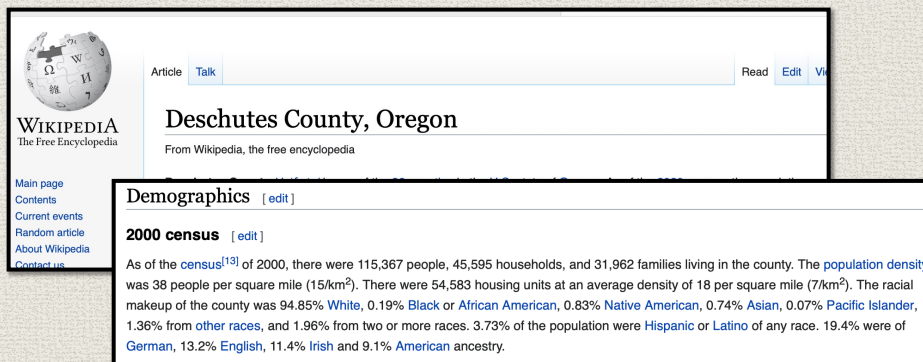
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Where Did These Descriptions Come From?

Examples of problematic words and phrases found in appraisal reports:

"The county was 94.85% white, 0.19% Black or African-American, 0.83% Native American, 0.74% Asian, 0.07% Pacific Islander, 1.36% from other races, and 1.96% from two or more races. 3.73% of the population were Hispanic or Latino of any race. 19.4% were of German, 13.2% English, 11.4% Irish and 9.1% American ancestry."

➤ Where did this come from?



The screenshot shows the Wikipedia page for Deschutes County, Oregon. The page title is "Deschutes County, Oregon" and it is identified as "From Wikipedia, the free encyclopedia". The "Demographics" section is highlighted, showing the "2000 census" data. The text in the highlighted section reads: "As of the census^[13] of 2000, there were 115,367 people, 45,595 households, and 31,962 families living in the county. The population density was 38 people per square mile (15/km²). There were 54,583 housing units at an average density of 18 per square mile (7/km²). The racial makeup of the county was 94.85% White, 0.19% Black or African American, 0.83% Native American, 0.74% Asian, 0.07% Pacific Islander, 1.36% from other races, and 1.96% from two or more races. 3.73% of the population were Hispanic or Latino of any race. 19.4% were of German, 13.2% English, 11.4% Irish and 9.1% American ancestry."

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Let's Look at Some Other Legal Issues and Laws That Appraisers Ask Me About

- Who owns your data or your appraisal report?
- Gramm Leach Bliley Act
- RESPA
- Do you have any others in mind?

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Let's Start with an "Easy" Question: Who Owns the Copyrights to an Appraisal Report?

1 Patrick H. Ballew, WSBA No. 16,939 The Honorable Robert H. Whaley
 2 Quinten S. Bowman, WSBA No. 35,064
 3 STRATTON BALLEW PLLC
 4 213 S. 12th Avenue
 5 Yakima, Washington 98902
 6 (509) 453-1319
 Attorneys for Plaintiff

7 UNITED STATES DISTRICT COURT
 8 EASTERN DISTRICT OF WASHINGTON

9 TIM VINING REAL ESTATE
 10 APPRAISER AND CONSULTANTS,
 11 INC., a Washington corporation,
 Plaintiff,
 12 v.
 13 CLARK JENNINGS & ASSOCIATES,
 14 INC., a Washington corporation; STEVE
 15 WEBER, and his marital community;
 16 HENRY JOHNSON, and his marital
 17 community; SCOTT ANDERSON, and his
 18 marital community; and JIM O'CONNOR,
 19 and his marital community,
 Defendants.

20 CAUSE NO. CV-04-3110-RHW
 21 JUDGMENT

22 Plaintiff having timely accepted Defendants' Offer of Judgment, and
 23 the Offer of Judgment and Plaintiff's Acceptance having been filed by the
 24 Plaintiff, it is hereby:
 25 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
 Plaintiff owns a valid, existing copyright under U.S. Registration No. TX 5-
 455-482 for the work entitled, *Self-Contained Appraisal Report, A & B Hop*

FILED IN THE
 U.S. DISTRICT COURT
 EASTERN DISTRICT OF WASHINGTON
 OCT 03 2005
 JAMES R. LARSEN, CLERK
 DEPUTY
 SPOKANE, WASHINGTON

1 Farms, Inc., Agricultural Properties, Grant County, Benton County, and
 2 Walla Walla County, Washington.
 3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
 4 Defendants are permanently enjoined from imitating, copying,
 5 counterfeiting, or making any unauthorized use of Plaintiff's copyrighted
 6 Appraisal Reports, or engaging in any activity constituting an infringement
 7 of Plaintiff's copyrights, or to assist, aid, or abet any other person in copying
 8 or infringing Plaintiff's copyrights.
 9 AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED
 10 that Plaintiff shall have a judgment against the Defendants on all claims and
 11 counterclaims in this action in the total amount of \$50,000.00, inclusive of
 12 costs.
 13 DATED: *October 3*, 2005.
 14 *[Signature]*
 15 *Deputy Clerk*
 16
 17

- Appraisal client was a bank
- 250-page report
- \$20,000 fee
- Appraiser registered copyright (but this is not critical)
- Brokers used parts of report to market and sell the properties
- Summary judgment granted that appraiser held valid copyright to report – questions remained about “implied nonexclusive licenses”

48

Let's Start with an Easy Question: Who Owns the Copyrights to an Appraisal Report?

In the appraiser copyright case, the court recognized accepted law that is applied to copyrighted products sold to clients:

“a seller grants a buyer an implied license to use a product for the purpose for which the seller sold it to the buyer.” *Foad Consulting Group, Inc. v. Musil Govan Azzalino*, 270 F.3d 821 (9th Cir. 2001).

This is determined by contract law, not copyright law.

Takeaway = agreements/contracts relating to ownership of appraisals and their content really matter.

49

But who owns the “data” in an appraisal report?

If data means facts and information – like number of apartment units, number of bedrooms, location of a property . . . no one owns the data itself (in the U.S., at least). If data includes higher level analytical information (like an opinion of value), things can get different.



The use or collection of data can be controlled – again by contract – and also under some privacy laws and, for appraisers, the confidentiality section of the Ethics Rule.

50

Residential Appraisers Grant Wide License Rights in URARs

Current URAR

21. The lender/client may disclose or distribute this appraisal report to: the borrower; ... data collection or reporting services; ... without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media).

Distribute any part, not whole?

What if just your sketch or floorplan were put in MLS?

New URAR

24. The lender/client may disclose or distribute this appraisal report to: the borrower; ... data collection or reporting services; ... Any person or entity who receives this appraisal report in accordance with the foregoing may choose to store, copy, reproduce, analyze, use and distribute this appraisal report in whole or in part in any format for internal or external purposes without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. A person or entity who receives a copy of an appraisal report does not become an intended user, unless the appraiser identifies such person as an intended user. The appraiser and supervisory appraiser (if applicable) shall have no liability for any use of this appraisal report not related to the mortgage finance transaction and related activities for which this appraisal report was prepared.

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A Bank's Simplified Provisions Regarding Ownership of Reports and "Data" with Appraisal Firms – Not Model Language

"Work Material." All reports, data, work product, information, documentation, ideas, concepts, research, plans, schematics and other materials created, performed, prepared or communicated by vendor under this Agreement are "Work Material."

Ownership of Work Material. Bank shall own all Work Material, including all copyrights to Work Material. Work Material shall be deemed "works made for hire" as defined in 17 U.S.C. §101 and §201(b).

Use of Work Material and Confidential Information. Vendor may not use, sell, transfer or disclose Work Material or Confidential Information for any reason other than its performance of services under this Agreement.

52

Gramm Leach Bliley Act (GLB) – an Appraiser Privacy Claim



Where contract language mattered in the real world.



53

USPAP Confidentiality Section of Ethics Rule

CONFIDENTIALITY:

...

An appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations applicable in an assignment.

An appraiser must not disclose: (1) confidential information; or (2) assignment results to anyone other than:

- the client;
- parties specifically authorized by the client;
- state appraiser regulatory agencies;
- third parties as may be authorized by due process of law; or
- a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

...

54

Gramm Leach Bliley Act (GLB)

Congress enacted the **Gramm Leach Bliley Act** (“GLB”) in 1999.

The GLB provides a framework for regulating the privacy and data security practices of a broad range of financial institutions. Among other things, the GLB requires “financial institutions” to:

- 1) Maintain security safeguards pertaining to nonpublic personal information about consumers, and
- 2) Provide certain notifications to consumers of the institution's privacy policies and practices with respect to information sharing.*

* 15 U.S.C. 6801(b), 15 U.S.C. 6805(b)(2)

55

Gramm Leach Bliley Act (GLB) – a High Level Summary of its Application to Appraisers and AMCs

This law applies to appraisers because, as the regulations published by the FTC and CFPB explain:

(h)(1) Financial institution means any institution the business of which is engaging in an activity that is financial in nature or incidental to such financial activities . . .

(2) Examples of financial institutions are as follows: . . .

(iii) A personal property or **real estate appraiser is a financial institution** because real and personal property appraisal is a financial activity listed in 12 CFR 225.28(b)(2)(i) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

It also applies to AMCs – here’s another listed example:

(x) An entity that provides real estate settlement services is a financial institution because providing **real estate settlement services is a financial activity** listed in 12 CFR 225.28(b)(2)(viii) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

* 16 CFR 314.2 Definitions.

56

Gramm Leach Bliley Act (GLB) – a High Level Summary of its Application to Appraisers

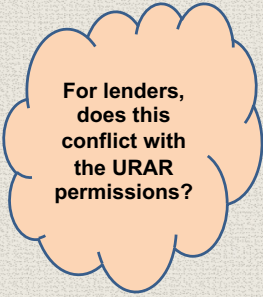
For appraisers, the GLB's application can be summarized in these very general rules:

An appraiser cannot distribute nonpublic personal information about consumers . . . to nonaffiliated third parties unless such consumers . . . have been given a privacy notice (by the lender, if it's their consumer/customer or by you if it's your direct consumer/customer) and the opportunity to opt-out of such distribution.

In appraisal reports, nonpublic personal information would be things like:

- Name of borrower.
- Loan/case/application number.
- Interior details; photos of personal items.
- Opinion of value.

A "consumer" is a person who has sought or received a single or incidental service from you for personal, family or household purposes.



For lenders, does this conflict with the URAR permissions?

* 16 CFR 314.2 and 16 CFR 314.3.

57

What the AMC Said About Confidentiality in Its Engagement Letter

- 8. Confidentiality.** By accepting this appraisal order, you agree to comply with all federal, state and local laws, rules, regulations and ordinances relating to privacy rights, including the Gramm-Leach-Bliley Act (GLBA). You are expected to practice such security measures as necessary to: Ensure the security and confidentiality of nonpublic personal information of customers and consumers (as defined in GLBA).

So, what happened in the investigation?

Takeaways = ?

58

Real Estate Settlement Procedures Acts (RESPA)?

Can you, as an appraiser, give a \$100 gift card to a chief appraiser at an FDIC-insured bank for every 5 residential mortgage appraisal assignments she sends you?

In other words, can you pay or compensate someone for sending you residential lending work?

The short answer is "No!" (for most lending appraisals). The reason why is the federal **Real Estate Settlement Procedures Acts (RESPA)**.

RESPA Section 8(a) prohibits kickbacks for business referrals related to or part of settlement services involving federally related mortgage loans.

The definition of real estate settlement services in RESPA includes appraisals. To be a violation, however, the referral must be related to or part of a settlement service involving a federally-related mortgage loan.

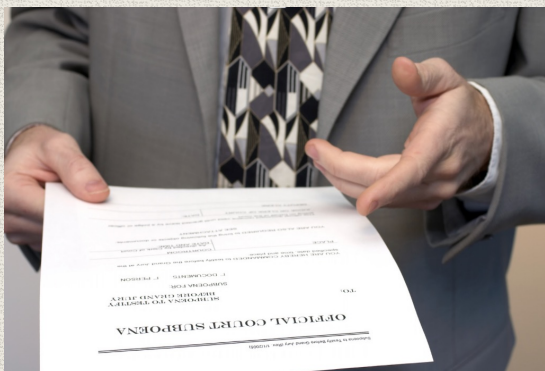
* 12 USC § 2602 and 2607(a); 12 CFR § 1024.2 and 1024.14.

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A Process Server is Knocking at Your Door

- What should you do?
- Flee to Canada?
- Accept service?
- E&O?



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What To Do If a Claim or Lawsuit Happens to You?



- Don't ignore it
- Get legal assistance
- Handle the lawsuit appropriately if you are served
- Report to E&O

61

3 Pieces of Bad Advice From the Internet

- "Don't report that disciplinary complaint to your E&O."
- "Since my firm is organized as a limited liability company, I don't have personal liability for my appraisals."
- "Only appraisers who do appraisals for mortgage lending get sued."

62

How to Turn a Potential Claim into an Actual Claim Part 1 – Chase “Quality Review” Letter

Dear Appraiser:

Your appraisal was selected for a quality review analysis by Chase Appraisal Panel Management. During the course of our review our analysis uncovered the following possible USPAP violations:

1. USPAP Standards 1-2(e)(i), 2-1(a), 2-2(b)(iii): The appraisal appears to be in violation of USPAP standard rules regarding proper identification and reporting of subject’s property data and characteristics as well as reporting in a manner that will not be misleading.
 - a) In the neighborhood section on page one, no box is checked for subject location; however it is noted as rural per comments. It is noted to be built up “over 75%” yet comments state rural area with properties of 2-20 acres and satellite imagery shows a very sparsely populated area.
 - b) No zoning information is provided. Per public record, the subject is zoned LCA11 – residential with light agriculture and farm animals acceptable. However use code per public record indicates “quadruplex”. Public record living area is noted as 4,858sf with 12BR, 4 bath and 4 separate units. The report provides no discussion of this data.

63

How to Turn a Potential Claim into an Actual Claim

Part 2 – The Appraiser’s “Appeal”

“Dear Appraisal Panel,

I would like to appeal your previous decision to place me on your Exclusionary list.

The appraisal in question was admittedly sketchy and very lacking in detail and clarity of presentation. I was truly appalled myself preparing the rebuttal to your review and I acknowledge that it did not meet the appropriate standards of reporting that it should have.

However, this was truly not representative of my work in 2007, nor does it have any similarity at all to the work that I do currently . . .”

64

Showing Respect for the Borrowers/Occupants

Allegations from a Maryland case against an appraiser

44. When Defendant [REDACTED] arrived, his demeanor was indifferent and aloof. Plaintiffs tried to engage with Defendant [REDACTED] to improve the mood, but their efforts were not reciprocated. [REDACTED] did not smile or make eye contact with Plaintiffs and said little other than noting that the home had a tankless water heater. Defendant [REDACTED]'s demeanor at their home seemed significantly different to Dr. Mott than it was when she spoke to Defendant [REDACTED] on the telephone to schedule the appraisal, which was prior to when he would have had occasion to see Dr. Connolly and Dr. Mott in person.

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Showing Respect for the Borrowers/Occupants

Allegations from North Carolina case against an appraiser



31. Plaintiff Brigid Washington was present in her home when the appraisers visited and communicated that she was the homeowner. The home was decorated with proud markers of the family's identity, including family photos, that identified the owners of the home to be Black.

32. The appraisal team was curt, abrupt, and dismissive toward Plaintiff Brigid Washington. The appraisers spent approximately 10 minutes at the Plaintiffs' home.

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66

Engagement Letters Really Work

- Let's consider a NY case – Stabilis Fund II LLC v. CBRE, Inc., (N.Y. Sup. Ct. 2019).
- Stabilis was the lender on a loan in default secured by a property in Florida.
- Defendant CBRE and its appraiser had earlier appraised the property for the loan.
- Stabilis was now contemplating foreclosure and sought a new appraisal from CBRE.
- CBRE had an existing signed engagement letter with Stabilis for appraisal services.
- The firm re-appraised the property in October 2013 shortly before the foreclosure sale.
- The appraisal fee was \$2,500.

67

Do Appraisers' Limitations of Liability Work?

- The crux of the legal claim is that the appraiser made a clear error in the report.
- The appraiser didn't include rental income from a new long-term tenant, resulting in a significantly lower valuation.
- The error resulted from a failure to update a spreadsheet in an earlier report.
- As a result, the lender alleges it permitted the property to be sold too cheaply at the foreclosure sale and settled litigation against the guarantor for too little.
- Stabilis has sued CBRE for \$1.1 million.

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Do Appraisers' Limitations of Liability Work?

- The signed engagement letter had a relevant provision:

IN NO EVENT WHATSOEVER SHALL EITHER PARTY'S TOTAL LIABILITY TO THE OTHER FOR DIRECT DAMAGES UNDER THE AGREEMENT OR ANY OTHER DAMAGES WHATSOEVER EXCEED IN THE AGGREGATE THE SUM OF TEN THOUSAND DOLLARS (\$10,000.00).

- In a summary judgment motion, the firm asked for the court to rule that this provision is enforceable.
- How did the court rule?

69

Do Appraisers' Limitations of Liability Work?

- The court described the law:

“Contractual limitations of liability are generally enforced and serve a broad public purpose by limiting a parties' exposure to liability and keeping the costs of goods and services down. In order to circumvent the limitation of liability cap with respect to its breach of contract action, plaintiff is required to demonstrate that defendant's conduct constituted gross negligence, which "must smack of intentional wrongdoing." . . . Gross negligence is conduct which "evinces a reckless indifference to the rights of others.”
- To be sure, there was a highly qualified expert witness hired by Stabilis ready to testify that the appraiser's error was “gross negligence” as opposed to a simple mistake.

70

Do Appraisers' Limitations of Liability Work?

- But nevertheless the court found: “that [the appraiser] made a calculation error by inserting an incorrect number in a spreadsheet does not constitute intentional wrongdoing.”
- The court ruled: “ORDERED that defendant is entitled to summary judgment fixing plaintiff's damages at a maximum of \$10,000 in accordance with the parties' contractual limitation of liability.”

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Engagement Letters Really Work

The screenshot displays the Appraisal Institute website. The main heading is "Appraiser Engagement Agreements". Below this, there is a section titled "Sample Materials for Services" which includes a list of "Professional Practice Documents" such as "Common Appraisal Errors and Issues", "Sample Certification Statements", and "Use of Designations, Emblems, and Logo". The page also features a "Login" button and a navigation menu with options like "AI Resources", "Education", "Publications", "Professional Practice", "News", "Advocacy", and "About Us".

72

Some Example Provisions

12. **Maximum Time Period for Legal Actions.** Unless the time period is shorter under applicable law, any legal action or claim relating to the appraisal or this Agreement shall be filed in court (or in the applicable arbitration tribunal, if the parties to the dispute have executed an arbitration agreement) within two (2) years from the date of delivery to Client of the appraisal report to which the claims or causes of action relate or, in the case of acts or conduct after delivery of the report, two (2) years from the date of the alleged acts or conduct. The time period stated in this section shall not be extended by any delay in the discovery or accrual of the underlying claims, causes of action or damages. . . .

13. **Limitations of Liability.** To the fullest extent permitted by applicable law, the maximum monetary liability of Appraiser, Firm or Client to one another or to any third party (regardless of whether such party's claimed use or reliance on the appraisal was authorized by Appraiser) for any and all claims or causes of action relating to the appraisal or Agreement shall be limited to the total compensation actually received by Appraiser for the appraisal or other services that are the subject of the claim(s) or cause(s) of action.

73

Among the Worst Risk Management Advice I've Ever Heard

"I put all my assets in my wife's name"

74

While We're on the Subject of Divorce Let's Talk about Litigation-Related Work

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES	
██████████ ██████████, an individual	Case No.: 19STCV24366
Plaintiff,	COMPLAINT FOR: (1) NEGLIGENCE (2) NEGLIGENCE MISREPRESENTATION (3) FRAUD (4) VIOLATION OF B&P CODE SEC. 17200 ET. SEQ.
vs.	
██████████ ██████████, an individual and DOES 1 to 20, inclusive,	
Defendants.	

75

Appraiser's Divorce Assignment Goes Bad

- In 2017, wife and husband are in a contentious divorce.
- They own two properties: their home and a 4-unit rental.
- Appraiser runs into husband who says he needs an appraiser for his divorce case.
- Mistake #1 happens – no engagement agreement.
- Appraiser values both properties - \$835k for the home and \$900k for the rental.

76

Appraiser's Divorce Assignment Goes Bad

- Mistake #2 happens – appraiser reports both appraisals on standard Fannie Mae pre-printed report forms.
- Mistake #3 – appraiser doesn't do a good job identifying his client/intended user in either report and just puts the last name.
- Mistake #4 – appraiser never reports the state complaint to his E&O.
- Wife agrees to a divorce settlement in court with the husband and claims she relied on the appraiser's reports in making the settlement (even though she had an appraiser expert witness on her own side).

77

Appraiser's Divorce Assignment Goes Bad

- The wife soon has regrets about the small size of the settlement she accepted – another appraiser provides retrospective appraisals that are \$175k and \$205k lower.
- She files a complaint to BREA.
- BREA cites the appraiser.

78

BREA Findings re Appraisal of Home

- a) Respondent failed to consistently identify the intended use of the appraisal report.
The report referred to the appraisal being used to estimate market value for purposes of marriage dissolution while the form defined the intended use as being for a mortgage finance transaction (S.R. 1-2(b) and S.R. 2-2(a)(ii));
- b) Respondent failed to develop a credible Sales Comparison Approach by:
 - i. Failing to explain the use of a sale price for Comparable One which was different than the sale price noted in public records;
 - ii. Failing to report the location of Comparable Two as being in a development with home-owner's association dues;
 - iii. Failing to report the equestrian facilities for Comparable Four; and
 - iv. Failing to provide adequate support for the site and car storage adjustments.
(S.R. 1-4(a) and S.R. 2-2(a)(viii));
- c) Based on the findings in a and b above, Respondent committed a series of errors that in the aggregate affects the credibility of the appraisal assignment results
(S.R. 1-1(c));

79

Appraiser's Divorce Assignment Goes Bad

- The punishment is 15 hours of specified basic education with an exam, a 4-hour corrective education course run by the Appraisal Foundation, and a fine of \$1,000.
- But it's not over.
- The wife sues the appraiser – to recover what she thinks she should have received in value in the divorce.

80

Appraiser's Divorce Assignment Goes Bad

- The appraiser must pay for his own defense at his own cost.
- Takeaways – use an engagement agreement, don't misuse report forms, do a good job specifying who your client is, and report legal issues promptly if you're insured.

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Thank You

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