

Top 15 Takeaways from Your Colleagues' Legal Misfortunes

3 Appraiser CE Hours

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Who Is Peter?

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I'm an attorney – in Bozeman, MT. Admitted to the state bars of CA, MT and WA.

My legal practice is entirely focused on real estate valuation services. My clients are primarily appraisal firms, AMCs and financial institutions.

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

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Where Are We Going?

- We're going to talk about a variety of legal situations and cases involving appraisers and appraisal firms.
- We'll see what we can learn from each of them – 15+ takeaways and lessons in all.
- We'll start with an introduction to the basic legal elements of a professional negligence claim – the most common legal claim against appraisers.

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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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Takeaway #1 – The Value of Precise Intended Use and User Language *Willemssen* – California 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.
 - **Five years later, Willemssen was unhappy with purchase and sued.**
 - He alleged the value was inflated because the appraisers failed to consider impact of earthquake fault and easement.
- **How do you think the case turns out?**

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Takeaway #1 – The Value of Precise Intended Use and User Language *Willemssen* – California 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. ➤

Poll #1: Does the appraiser win the motion to dismiss the case? Yes or no.

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Takeaway #1 – The Value of Precise Intended Use and User Language *Willemssen* – California Court of Appeal (2014)

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

Furthermore, the Appraiser [REDACTED] Defendants 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. Finally, the purpose of the appraisal report was to aid the bank in determining whether the proposed collateral had a value sufficient to support the contemplated loan, not to assure Willemssen that it was suitable for use as a recycling facility or free from earthquake faults, or to disclose planned roadways to him. ➤

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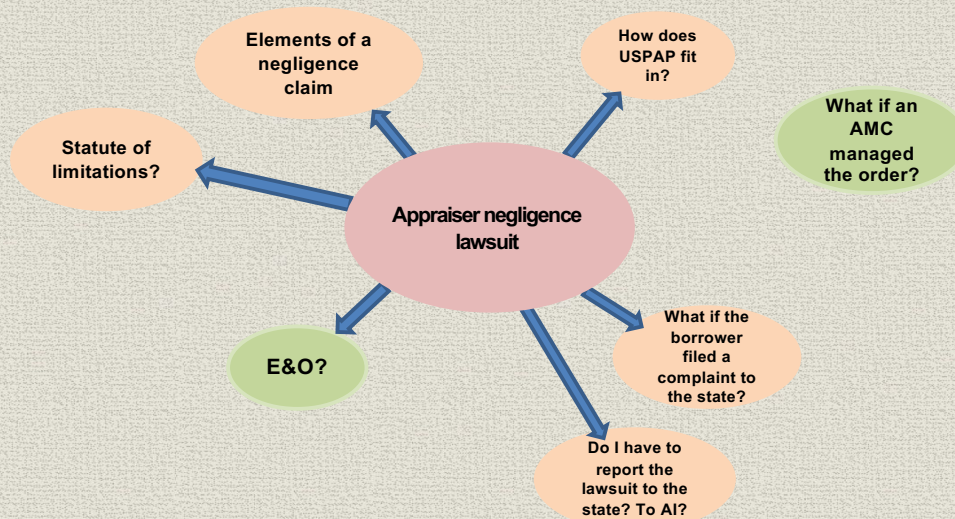
Takeaway #1 – The Value of Precise Intended Use and User Language *Willemssen* – California Court of Appeal (2014)

Takeaway:

- In addition to being a USPAP compliance requirement, your descriptions of intended use and user in appraisal reports are specifically relevant to determining the parties to whom you owe legal duties.
- The descriptions help frame who can sue you and what they can sue you about.
- For risk reduction, narrower and more precise is better.

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This situation raises a lot of issues. Let's look at some of them.



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Review Appraiser Liability Claims

Case example: MAI in California sues another MAI who performed a review that allegedly caused the first appraiser to lose work with the client.

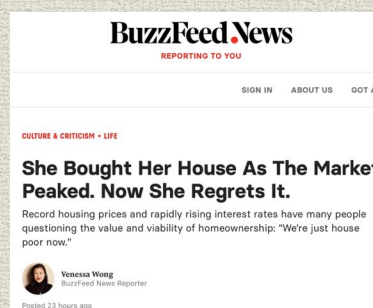
The bank retained defendant ..., another real estate appraiser, to perform a "technical review" of appellant's previously submitted appraisal. . . The 11-page letter was unrelentingly critical of appellant's appraisal. The letter concluded: "The [appraisal] report, as reviewed, was not considered to comply with the requirements of the Uniform Standards of Appraisal Practice [sic]. This was not considered a credible report. The value conclusions were both inaccurate and misleading. The client is advised that the value conclusion presented in the report of \$4,400,000 was considered substantially overstated, relative to a current date of value or any prospective date of value in October 2006, and should not be relied upon as a basis in loan making decisions.

Poll #2: Is the original appraiser likely to have a successful negligence claim against the review appraiser? Yes or no.

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How Are Lawsuit Claims Against Appraisers Currently?

- Infrequent, as a result of very low default rates on mortgages for the last 8 years and continuously rising real estate prices – until recently.
- Perhaps a slight recent increase in claims because of changing financial and market conditions.



Keep this in mind: it's appraisals performed at or near the peak of markets that become the subject of claims years later.

- Watch for complacency.
- It's definitely the time to be prudent.

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Sage v. Blagg
221 Ariz. 33 (Ariz. Ct. App. 2009)
One Case - Two Takeaways

- Shari Sage made an offer to purchase a Scottsdale home for \$605,200 in the fall of 2004.
- The offer was written on the Arizona Association of Realtors standard form "Residential Resale Real Estate Purchase Contract."
- The form stated that the buyer's obligation to complete the purchase was "contingent upon an appraisal of the Premises by an appraiser acceptable to the lender for at least the sales price."

2m. 90. **Appraisal Contingency:** Buyer's obligation to complete this sale is contingent upon an appraisal of the Premises acceptable to 91. lender for at least the purchase price. If the Premises fail to appraise for the purchase price in any appraisal required by lender, 92. Buyer has five (5) days after notice of the appraised value to cancel this Contract and receive a refund of the Earnest Money or 93. the appraisal contingency shall be waived.

2n. 94. **Appraisal Fee(s):** Appraisal Fee(s), when required by lender, shall be paid by ☐ Buyer ☐ Seller ☐ Other _____

95. Appraisal Fee(s) ☐ are ☐ are not included in Seller Concessions, if applicable.

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Sage v. Blagg
221 Ariz. 33 (Ariz. Ct. App. 2009)
One Case - Two Takeaways

- After her offer was accepted and loan application submitted, the lender retained appraiser Blagg to perform the appraisal.
- Sage had signed a form requesting Security to provide her with a copy of the appraisal, which she received prior to closing.
- The appraisal, dated September 14, 2004, recited the livable area of the home as 2,440 square feet and estimated its market value to be \$620,000 (\$15k higher than the sales price).

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Sage v. Blagg
221 Ariz. 33 (Ariz. Ct. App. 2009)
One Case - Two Takeaways

- A year and a half after she bought her home, Sage obtained another appraisal in connection with a refinancing.
- That appraisal stated that the livable area of the home was 1,871 square feet, 569 fewer square feet than stated in the Blagg appraisal.
- Sage then sued Blagg and his company, alleging his appraisal negligently misrepresented the value of her home at the time of her purchase.

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Sage v. Blagg
221 Ariz. 33 (Ariz. Ct. App. 2009)
One Case - Two Takeaways

- Sage alleged that if Blagg's appraisal had calculated the home's value based on the correct amount of livable space, she would have realized the home was then worth less than she had contracted to pay for it and would have exercised her right to cancel the deal.
- Blagg moved to dismiss the case, his lawyer arguing Blagg owed Sage no duty of care.

Poll #3: Does appraiser Blagg win a motion to dismiss the case? Yes or no.

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Sage v. Blagg
221 Ariz. 33 (Ariz. Ct. App. 2009)
One Case - Two Takeaways

- Trial court first dismissed the case. Court of Appeal reversed.
- Court of Appeal ruling: “We hold that an appraiser retained by a lender in connection with a purchase-money mortgage transaction owes a duty of care to the borrower who is the prospective buyer of the home to be appraised.”
- Court also noted “In March 2005, a few months after Blagg performed his appraisal of the home Sage was to purchase, [Freddie Mac] and [Fannie Mae] issued a revised Uniform Residential Appraisal Report . . .”

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Takeaway #2 – Most Common Mistake

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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1004 Appraisal Report Form Problems

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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Takeaway #3 – Mitigating the Risk of Borrower Claims with Specific Additional Language

Takeaway:

- Use additional language in reports directed at claims by borrowers (and sellers).

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#3 – Takeaway: Suggested Language 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.

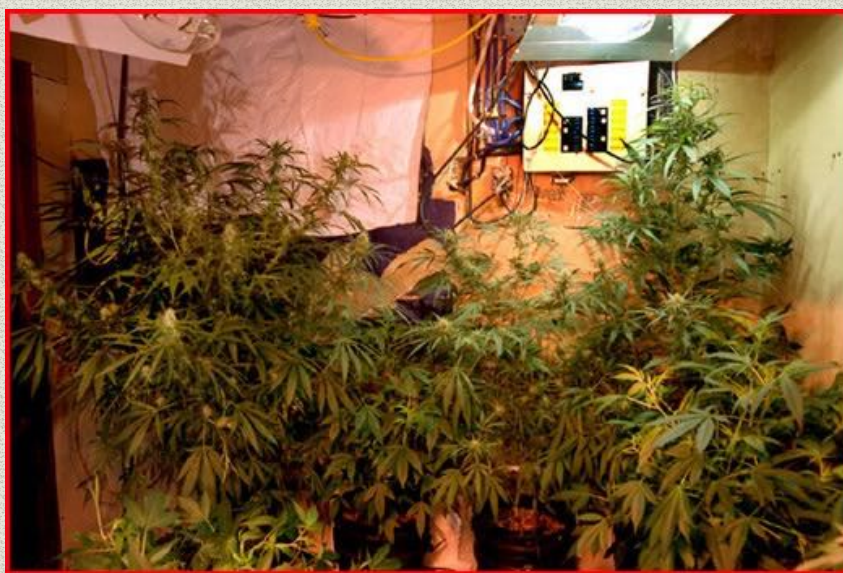
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3. **Property condition/characteristics.** The appraiser failed to discover or report a unique issue or problem with the subject property. The most common alleged issues and problems include:
 - The property suffers from a condition problem such as 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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Use Plain English Disclosures and Photos to Minimize Liability Risk



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Another Great Opportunity for Plain English and Photos



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Takeaway #4 – Three Separate Cases, Same Takeaway: Trust Your Instincts

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION	
FIX & FLIP FINANCING, LLC, a Michigan limited liability company,	
Plaintiff,	
v.	Case No. 2020 -cv- Hos
APPRAISAL [REDACTED]	CAUSE NO. [REDACTED]
SHARESTATES INVESTMENTS, LLC AND PALLASITE REO 2018-1, LLC	
v.	IN THE JUDICIAL DISTRICT COURT
	OF HARRIS COUNTY, TEXAS
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT	
ACF FINCO I LP, a Delaware limited partnership,	Case No. 20STCV37455
Plaintiffs,	COMPLAINT FOR:
v.	(1) NEGLIGENCE; (2) BREACH OF CONTRACT; AND (3) NEGLIGENT MISREPRESENTATION
GREAT AMERICAN GROUP ADVISORY & VALUATION SERVICES, LLC, a California limited liability company, and DOES 1 through 10, inclusive,	JURY TRIAL DEMANDED
Defendants.	

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Alternative Lenders = More Risk

- Alternative, “hard-money” or “asset-based” lenders pose a much higher risk to appraisers than traditional bank and mortgage lenders – especially in the economic environment of COVID.
- “Appraise” your clients and assignments for risk.
- Follow your instincts with respect to risky clients or assignments.
- Your survival instinct is usually right.



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Other Legal Issues for Appraisers?

- **Violations of privacy and confidentiality.**
- **RESPA?**
- **Discrimination and bias.**

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Takeaway #5

The 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)

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

This law applies to you as an appraiser 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).

* 16 CFR 314.2 Definitions.

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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 and customers to nonaffiliated third parties unless such consumers and customers 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.

For appraisers, 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. A "customer" is consumer who has an ongoing relationship with you – such as purchasing appraisals from you on a routine basis.

* 16 CFR 314.2 and 16 CFR 314.3.

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

Do appraisers need to give "privacy notices" under the GLB to their consumers and customers? **Answer: Almost Never for Most Appraisers.**

In sum, a real estate appraiser only needs to provide a privacy notice to a consumer if:

- The appraiser has performed an appraisal directly for that consumer, and
- The appraiser wants to disclose nonpublic personal information about the consumer to nonaffiliated third parties. (Why would you want to do that?)

If you want to do that, please research the requirements for privacy notices carefully.

If you routinely perform appraisals for an individual, then you probably have a "customer" relationship with that person and you must give a privacy notice to the customer (if you want to comply with the law).

In general, appraisers have few direct applicable transactions

* 16 CFR 314.2 and 16 CFR 314.3.

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Gramm Leach Bliley Act (GLB) – a High Level Summary

➤ Safest Privacy Advice re GLB:

Regardless of how you receive the information and regardless of whether you have a “consumer” or “customer” relationship with the borrower or another party, don’t disclose nonpublic personal information to third parties, who are not necessary to your performance and delivery of the appraisal.

Please also remember that you have additional confidentiality duties under USPAP (2020-21):

CONFIDENTIALITY:

An appraiser must protect the confidential nature of the appraiser-client relationship. ... 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.

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Gramm Leach Bliley Act (GLB) – a Privacy Claim



Poll #4: Does the state find the appraiser violated the Gramm Leach Bliley Act? Yes or no.



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Takeaway #6: 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?

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

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Takeaway #6: RESPA?

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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Takeaway #6: RESPA?

What does USPAP say?

MANAGEMENT:

An appraiser must disclose that he or she paid a fee or commission, or gave a **thing** of value in connection with the procurement of an assignment.

Comment: The disclosure must appear in the certification and in any transmittal letter in which conclusions are stated; however, disclosure of the amount paid is not required. In groups or organizations engaged in appraisal practice, intra-company payments to employees for business development do not require disclosure.

FAQ

See also
FAQ 34-52

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

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Let's Move to Allegations About Appraisal Bias and Discrimination

- A situation in Jacksonville, FL is representational of more than two dozen recent similar stories concerning alleged discrimination in appraisals around the country.
- Originally some argued “these are just anecdotes . . .”
- But, when you are the person who believes they have been discriminated against – or when your firm is accused in the anecdote, it doesn't matter so much to you whether “it's just anecdotal.”
- No one wants to be a discrimination anecdote.



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#9 – Understand Basic Fair Housing Laws and Their Application to Appraising

Four Primary Forms of Legal Risk to Appraisers, AMCs and Lenders Relating to Fair Housing Claims and Discrimination Claims:

1. Complaint to HUD – Office of Fair Housing and Equal Opportunity.
2. Complaint to a state agency.
3. Legal action in court, asserting Fair Housing Act and related claims.
4. CFPB investigation.

United States of America
Consumer Financial Protection Bureau

Civil Investigative Demand

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Consumer Financial Protection Bureau.

Poll #5: Can factual data from the US Census regarding the race demographics of a neighborhood be used in an appraisal of an apartment building for a refinance loan? Yes or no.

The Fair Housing Claim/Investigation

Two key federal laws:

- The first – and perhaps most common in legal actions relating to discrimination in appraisals – is the **Fair Housing Act (FHA)** enacted as part of the Civil Rights Act of 1968. Applies to appraisers, firms, AMCs, lenders – all parties:

“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).)

- The second key law is the **Equal Credit Opportunity Act (ECOA)**, which similarly makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age...” (15 U.S.C. § 1691.)



Takeaway #10 – Guard Against Improper References in Your Report Avoid this Appraiser's Copy/Paste Mistake



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.

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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.

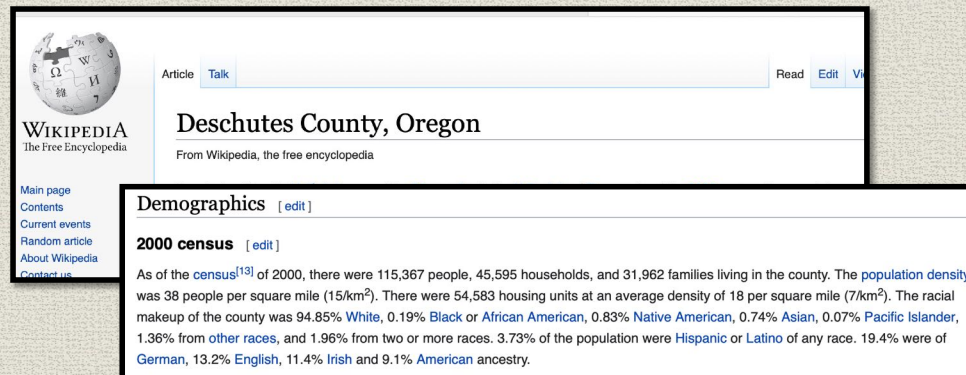
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Where Did These Descriptions Come From?

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?



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#10 – Guard Against Improper References in Your Report

Takeaway:

- Even if it's a "fact" and it has a source, information about racial, ethnic, religious, nationality, familial characteristics of the occupant owners of a property or in an area can never be considered in a residential appraisal or an appraisal for lending (really, such factors should almost never be considered or reported in any appraisal).
- So obvious but: avoid blindly copying and pasting content from other sources; read every word.

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Takeaway # 11: Allegations of Discrimination Are Not Just a Residential Appraiser Issue – Examples of Recent Allegations of Discrimination Affecting Commercial Appraisers

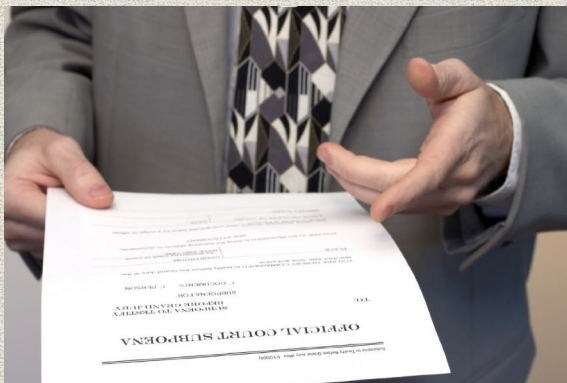
- HUD complaint filed by owners of multi-family property alleging undervaluation.
- Black farmer alleging undervaluation of his farm for an ag loan based on his race (home on the farm makes it a Fair Housing Act claim).
- State appraiser licensing board complaint relating to appraisal of a school facility.
- Threatened regulatory complaints and lawsuit by owner of national chain restaurant property.
- Threatened HUD complaint and lawsuit regarding mixed-use property.

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#12 – A Process Server is Knocking at Your Door

- What should you do?
- Flee to Montana?
- Accept it?
- E&O?



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U.S. v. 2,091.712 Acres of Land,
U.S. District Court, E.D. North Carolina 2010

- Federal condemnation case.
- Government taking a restrictive easement over land adjacent to a Marine Corps air station.
- Government subpoenaed all appraisals by landowner's appraiser of similar properties near military air bases and civilian airports – all for different and varying clients.
- The appraiser takes the position that he will not produce appraisals for other clients because they are protected against disclosure by the confidentiality section of the Ethics Rule in USPAP.

Poll #6: Does the court require the appraiser to produce the appraisal reports? Yes or no.

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U.S. v. 2,091.712 Acres of Land,
U.S. District Court, E.D. North Carolina 2010

- Court ruled USPAP confidentiality did not provide basis for appraiser refusing to disclose the appraisals.

“The law does not afford an evidentiary privilege to professional appraisers. Moreover, the USPAP rules themselves explicitly contemplate the production of such documents to ‘third parties as may be authorized by due process of law.’ ”

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Handling a Subpoena

- Understand difference between fact and expert witness.
- Know USPAP confidentiality rule.
- Use a practical approach in discussing subpoena with the attorney.
- Seek assistance if the subpoena may be hinting at a potential claim.

CONFIDENTIALITY:

...

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.

...

Takeaway #13 - 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.

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 . . .”

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Takeaway #14 I don’t know what to say

FILED: SUFFOLK COUNTY CLERK 01/24/2023 04:1
NYSCEF DOC. NO. 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
-----X
EAST COAST CAPITAL CORP.,

Plaintiff

-against-

NO APPRAISALS, INC. and
MO,

Defend

Background Facts

4. On or about December 15, 2020, Antonio Bravo-Gonzalez applied to East Coast for a loan in the amount of \$544,500 to finance the purchase of the single-family home located at 260 Old County Road S., Wellington, Florida 33414 (the “Property”). Pursuant to the “As Is” Residential Contract for Sale and Purchase, the purchase price for the Property to be paid by Mr. Bravo-Gonzalez was \$605,000.

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Takeaway #14

I'm at a loss for words

6. Defendants accepted the appraisal assignment, performed the appraisal at the Property on December 23, 2020 and issued the Form 1004 Uniform Residential Appraisal Report for the Property (the "Appraisal Report") on December 29, 2020. The Appraisal Report states that the market value of the Property was \$611,000 and the cover page reflects that the Appraisal Report was specifically made for East Coast.

9. On or about April 22, 2021, East Coast sold the \$544,500 Bravo-Gonzalez loan (the "Loan" to JP Morgan Chase Bank ("Chase") on a correspondent basis. Thereafter, Chase sold the Loan to Fannie Mae.

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Takeaway #14

I'm at a loss for words

10. On January 18, 2022, Chase notified East Coast that Fannie Mae had audited the Loan, including the Appraisal Report, and found multiple deficiencies resulting in a determination that the Loan did not meet Fannie Mae guidelines.

11. Specifically, Fannie Mae determined that the Appraisal Report contained errors and deficiencies by defendants including (i) the improper comparable sales selection due to location, and (ii) the improper use of dissimilar comparable sales due to site characteristics. Fannie Mae guidelines require appraisers to use comparable sales that are the most locationally and physically similar to the subject property.

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Takeaway #14

I'm at a loss for words

16. The explanation by defendants in response to the Fannie Mae deficiencies determination regarding the comparable sales used was rejected by Fannie Mae.

17. As a result of the errors and deficiencies in the Appraisal Report by defendants, Chase repurchased the Loan from Fannie Mae and then demanded that East Coast repurchase the Loan from Chase.

21. As a result, East Coast was damaged in excess of \$112,910.08, which is the difference between the Loan repurchase price paid by East Coast to Chase and the Loan resale price East Coast received from NASB.

FIRST CAUSE OF ACTION
(Negligence)

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Fannie Mae Filed a Complaint to the State. It was dismissed as having “no probable cause.” The lender filed its lawsuit anyway.

11. Sometime after this, in or about 2022, [REDACTED] Fannie Mae had filed a complaint with the Florida Department of Business and Regulation (“FDBR”) regarding alleged errors with the appraisal.

12. Among other things, Fannie Mae’s complaint alleged that the appraisal contained errors which overvalued the house and was relied upon in determining the amount to lend to purchase the home.

13. In or about December 2022, I learned that FDBR found that there was no merit to Fannie Mae’s complaint, and it issued a finding of No Probable Cause to move forward with a formal administrative action. The case was closed.

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Takeaway #14

- Risk is heading up a small bit.
- It's a good time to make sure you keep good E&O in place.

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Takeaway #15: 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.

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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?

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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.

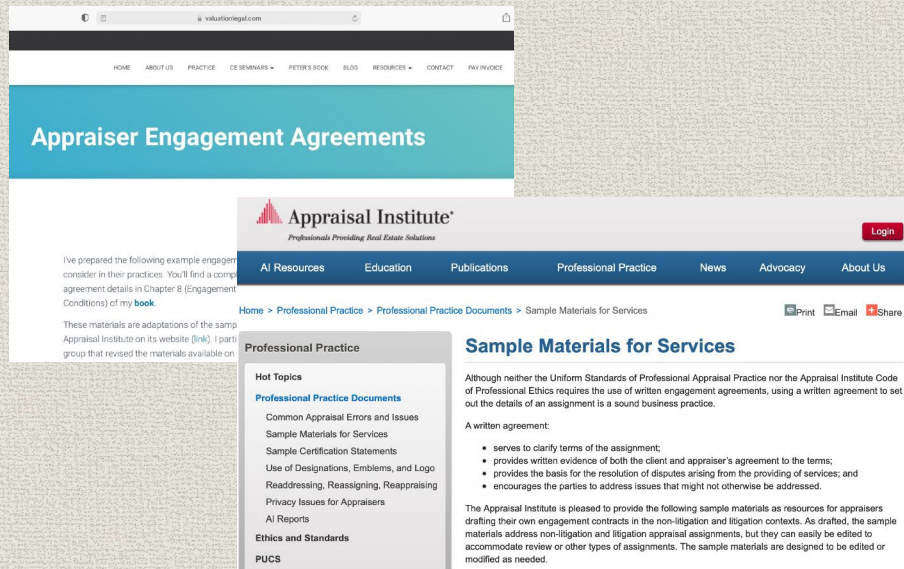
61

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



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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.

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Case #16 - 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

*Kindness
MATTERS*

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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Thank You

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