

Top 15 Takeaways from Your Colleagues' Legal Misfortunes

3 Appraiser CE Hours

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 is sponsored by:

Who Is Peter?

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?

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.

- USPAP has the force of law and regulation for appraisers under state appraiser licensing laws – but there is no specific legal claim for a violation of USPAP.
- It's still 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.

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Takeaway #1: Borrowers = Most Common Claimant “Typical” Buyer’s Remorse Case

January 15, 2009



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“Typical” Buyer’s Remorse Case

1 JOEL K. LIBERSON (SBN: 164857)
2 JASON N. WOLFORD (SBN: 194177)
3 LIBERSON & WOLFORD LLP
4 660 Market Street, 5th Floor
San Francisco, CA 94104
Tel.: (415) 677-4110
Fax: (415) 358-8154

5 Attorney for Plaintiffs
6 TYP, LLC, CHESLEY B. SULLENBERGER III, and
LORRAINE SULLENBERGER

7
8 SUPERIOR COURT OF CALIFORNIA - COUNTY OF BUTTE

9
10 **BY FAX**
C 10-01879

11 TYP, LLC, CHESLEY B. SULLENBERGER III, and LORRAINE SULLENBERGER,
12 Plaintiffs,
13 v.
14 [Redacted]
15 NATIONAL BANK, [Redacted] and
16 DOES 1 through 10, inclusive,
17 Defendants.
18

FILED
Superior Court of California
County of Butte
APR 23 2010
Kimberly Hens, Clerk
Deputy

FIRST AMENDED COMPLAINT FOR:

1. DECLARATORY AND INJUNCTIVE RELIEF;
2. FRAUD AND DECEIT;
3. FRAUD AND NEGLIGENT MISREPRESENTATION;
4. CONSTRUCTIVE FRAUD;
5. BREACH OF FIDUCIARY DUTY;
6. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING;
7. UNJUST ENRICHMENT;
8. NEGLIGENCE.

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Allegations from “Typical” Buyer’s Remorse Case

1 22. On or around October 2009, Plaintiffs obtained a forensic appraisal of the Subject
2 Property. The appraisal verified that Defendants’ representations regarding the fair market value
3 of the Subject Property when it was purchased in 2002 had been significantly overstated. The
4 forensic appraisal indicated in pertinent part as follows:

5 It is our opinion that the market value of the Leased Fee Interest in the subject property,
6 as of October 20, 2002, should fall within a value range of \$680,000 to \$720,000. This
7 range of value has been based on a review and analysis of numerous sales and rent
8 comparables of auto-service related facilities in the Northern California marketing area
9 which had closing dates between 2000 and early 2003 (and also included an analysis of
10 the four sales and four rent comparables utilized in the original appraisal report – which
were represented by the same four properties). It appears that the original appraised value
of \$920,000 and contract sales price of \$935,000 were substantially above market value.
This may have occurred for a number of reasons from both an appraisal perspective, but
also from a lack of fiduciary responsibility on the part of the other real estate
professionals involved in the transaction.

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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 two real cases.

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_Takeaway #2 = Square Footage Most Common Mistake

Sage v. Blagg 221 Ariz. 33 (Ariz. Ct. App. 2009)

- 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 #1: Does appraiser Blagg succeed in getting the case dismissed? 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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Takeaway #3: The Value of Precise Intended Use and User Language

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



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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 and its appraiser moved for summary judgment to get the case dismissed on the basis that Value Logic did not owe the investors a legal duty.

Poll: Does the MAI succeed in getting the case dismissed? Yes or no.

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

- The summary judgment 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 Ruling Points 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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Takeaway #4 – 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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Takeaway: 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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Takeaway #5: What's the Statute of Limitations?

1 22. On or around October 2009, Plaintiffs obtained a forensic appraisal of the Subject
2 Property. The appraisal verified that Defendants' representations regarding the fair market value
3 of the Subject Property when it was purchased in 2002 had been significantly overstated. The
4 forensic appraisal indicated in pertinent part as follows:

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were represented by the same four properties). It appears that the original appraised value
of \$920,000 and contract sales price of \$935,000 were substantially above market value.
This may have occurred for a number of reasons from both an appraisal perspective, but
also from a lack of fiduciary responsibility on the part of the other real estate
professionals involved in the transaction.

Poll: Would the MAI in CA succeed with his statute of limitations defense? Yes or no.

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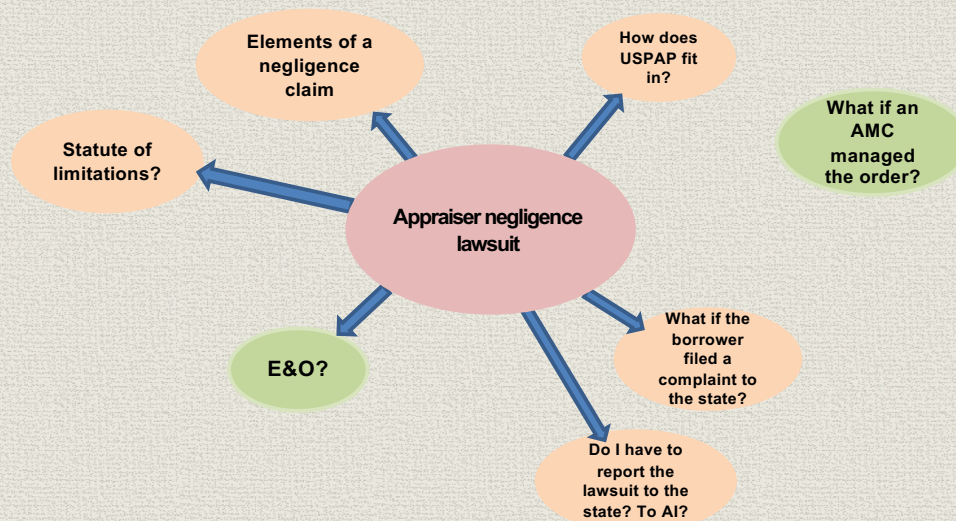
Statute of Limitations Chart Link www.valuationlegal.com/limitations/

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	Ariz. Rev. Stat. Ann. § 12-542
Arkansas	3	No. Arkansas has adopted an appraiser-specific statute of limitations.	Ark. Code § 17-14-206(c)(1) (as amended by SB 394 in 2019)
California	2	Yes	Ind. Code § 34-11-2-4
Colorado	2	Yes	Iowa Code Ann. § 614.1
Connecticut	2	Yes	Kan. Stat. Ann. § 60-513
Delaware	3	Yes	Ky. Rev. Stat. Ann. § 413.140(3)
Florida	2, for claims by clients For dia with nc	Yes, to For dia with nc	La. R.S. § 9:5610
Georgia	4	The lin applies has no	Me. Rev. Stat. Ann. Tit. 14, § 752
			Md. Cts. & Jud. Proc. Code Ann. § 5-101
			Mass. Ann. Laws ch. 260, § 4
			MCL 600.5805(9) and MCL 600.5838(2)
			Minn. Stat. § 82B.24, Subd. 4

Screenshot

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These situations have raised a lot of issues. Let's look at some of them.



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Takeaway #6: Reviewer Protections 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: Is the original MAI 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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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- _____
APPRAISAL _____ _____	CAUSE NO. _____
SHARESTATES INVESTMENTS, LLC \$ IN THE JUDICIAL DISTRICT COURT AND PALLASITE REO 2018-1, LLC \$ \$ \$ \$	
V. _____	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,	
Plaintiffs,	
V.	Case No. 20STCV37455
GREAT AMERICAN GROUP ADVISORY & VALUATION SERVICES, LLC, a California limited liability company, and DOES 1 through 10, inclusive,	
Defendants.	
COMPLAINT FOR: (1) NEGLIGENCE; (2) BREACH OF CONTRACT; AND (3) NEGLIGENT MISREPRESENTATION	
JURY TRIAL DEMANDED	

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.**
- **Expert witness issues.**

- **Discrimination and bias.**

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Takeaway #7 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: Does the state find the appraiser violated the Gramm Leach Bliley Act? Yes or no.



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Takeaway #8 For Appraisers Who Work as Expert Witnesses: Can an Unhappy Party on the Other Side of a Case Sue You for Negligence?

Can any unhappy party on one side of any litigation, condemnation, arbitration, etc. sue the other side's expert?

Let's find out . . .

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An Unhappy Property Owner in a Condemnation Case Sues the State's Expert Witness Appraiser

- An experienced appraiser and his firm were hired by the state to value a largely undeveloped parcel for highway condemnation purposes.
- He appraised the property at approximately \$1,000,000.
- Property owner declined a pre-litigation offer based on that appraisal.
- The state then commenced an eminent domain proceeding.
- At trial, the state's appraiser testified to the same \$1m valuation, while the property owner's expert appraiser testified to a \$7m value.

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An Unhappy Property Owner in a Condemnation Case Sues the State's Expert Witness Appraiser

Facts of the Case (Cont'd)

- The jury split the difference and awarded approximately \$4m to the property owner.
- The property owner was not satisfied with that outcome.
- The owner then sued the state's expert appraiser, contending that his valuation was erroneously low and alleging various claims of negligence.
- The owner alleged that the condemnation award at trial would have been higher but for the allegedly erroneous low value and demanded damages from the state's expert and his firm for the difference.

➤ **Poll: Does the MAI win a motion to dismiss?**

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An Unhappy Property Owner in a Condemnation Case Sues the State's Expert Witness Appraiser

- **Yes, for two reasons.**

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Appraiser Liability Claims Remember the Elements of a Professional Negligence Claim

The key legal elements of a negligence claim:

- Duty owed by the defendant *to the plaintiff* to conform his or her conduct to a standard of care.
- Breach of that duty – *e.g.*, providing an inflated valuation or failing to produce a USPAP-compliant appraisal or, in the case of an expert, perhaps failing to produce admissible work product.
- Reliance by the plaintiff on the appraiser's work.
- Actual damages to the plaintiff.

- **The property owner loses because the other side's appraiser owes them no legal duty.**

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**Who is your client?
Who are your intended users?**

Always use as narrow and precise of language on user and use as possible in every report – of every type.

In a divorce, have you been retained only by one spouse or both? Be clear.

Partners have a disputed buy out. You're being retained. Are you working for one or both? Be clear.

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**An Unhappy Property Owner in a Condemnation Case Sues
the State's Expert Witness Appraiser**

The other – very important – reason the property owner should lose is something called litigation privilege or witness immunity.

The court in New Hampshire makes this point.

Legal outcome of the case in New Hampshire:

- The trial court dismissed the property owner's claims against the appraiser and his firm based on "witness immunity."
- New Hampshire's Supreme Court upheld that dismissal.
- The Court wrote in its opinion:

"The purpose of this privilege is to encourage witnesses to testify and to ensure that their testimony is not altered or distorted by the fear of potential liability."

Provencher v. Buzzell-Plourde Assoc., NH Supreme Court 1998

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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.



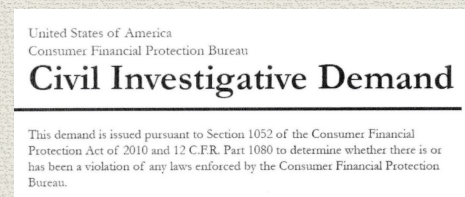
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#9 – Understand Basic Fair Housing Laws and Their Application to Appraising

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.



Poll: 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.

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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.)



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

The screenshot shows the FHFA Insights website. The header includes the FHFA logo and navigation links: About Us, Supervision & Regulation, Conservatorship, Data & Tools, Policy, Programs & Research, and More. The main content area features the title 'Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary' and a 'Key Takeaways' section with three bullet points:

- 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 basis 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.

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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?



The screenshot shows the Wikipedia page for Deschutes County, Oregon. The page title is "Deschutes County, Oregon" and it includes a "Demographics" section. The text in the demographics section is highlighted in yellow, matching the text in the slide above. The text 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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#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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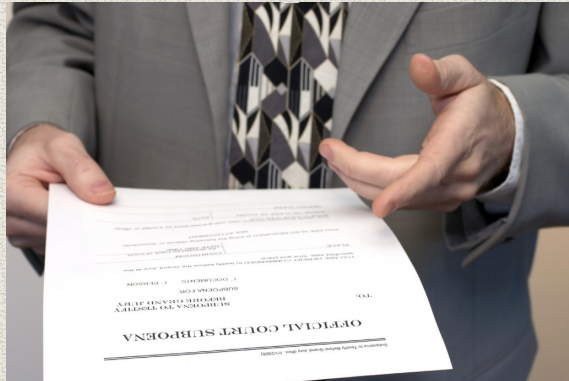
Takeaway # 11: Allegations of Discrimination Are Not Just a Residential Appraiser Issue – Examples of Recent Allegations of Discrimination Affecting Commercial Appraisers

- 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.
 - Appraisers object – raises the issue of confidentiality
- How does the court rule?

Poll: Does the MAI have to produce his other clients' 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.’ ”

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: 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:

UNDER NO CIRCUMSTANCES WHATSOEVER SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, PUNITIVE, OR INCIDENTAL DAMAGES OF ANY KIND WHATSOEVER. 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 judgement motion, the firm asked for the court to rule that this provision is enforceable.
- **Poll: Does the court enforce the limitation of liability?**

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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.

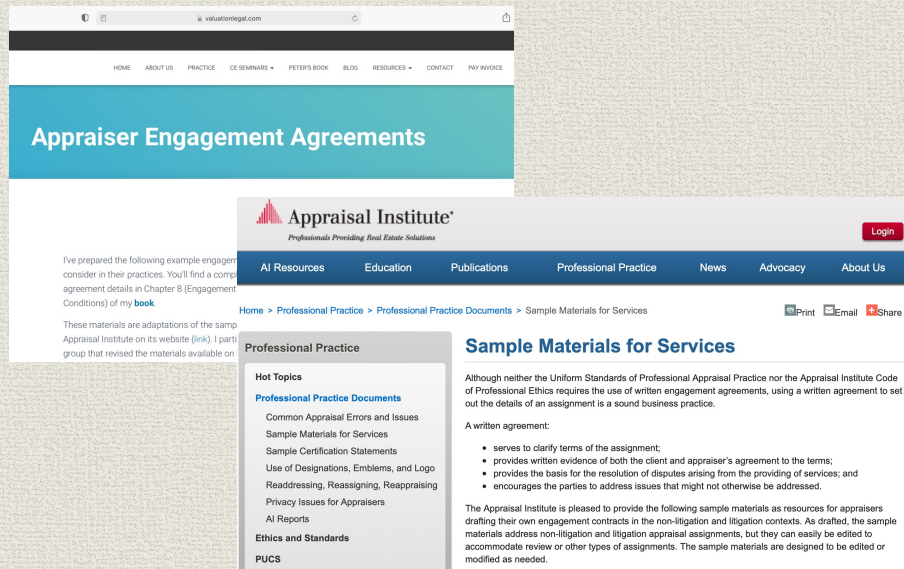
65

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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Takeaway #15 – Importance of 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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