

Top 15+ Takeaways from Your Colleagues' Legal Misfortunes

3 Appraiser CE Hours

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About Peter

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I'm an attorney. My legal practice is entirely focused on real estate valuation services. My clients are primarily appraisal firms, AMCs and financial institutions. I was for over 10 years general counsel to LIA (www.liability.com) – the Appraisal Institute's endorsed E&O provider.

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

I live in Bozeman, MT, and I'm a member of the Montana Real Estate Appraisers Board.

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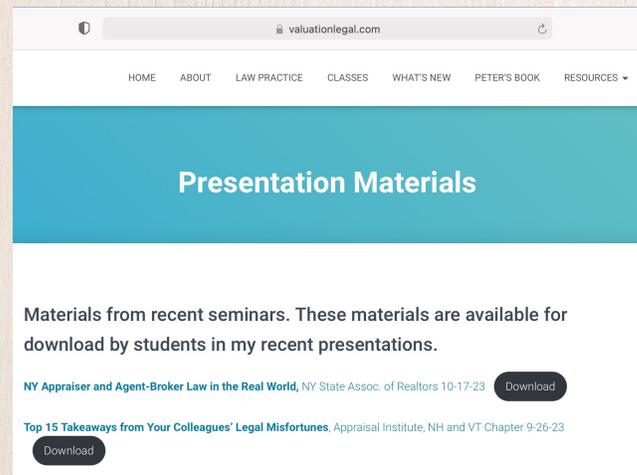
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Where Are We Going?

- 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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Copy of Presentation



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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.

- 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 be talking about – where an appraiser is being accused of professional negligence.
- USPAP forms a large part of what is called the "**standard of care.**" (But it doesn't cover all the details).
- And, as we'll see, the USPAP concepts of "intended use" and "intended user" also largely define who can sue an appraiser.

Colorado Case: HICE v. LOTT, 223 P.3d 139 (Colo. App. 2009).

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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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A Not So “Typical” Buyer’s Remorse Case Involving a Bank, a Real Estate Broker and an Appraiser

January 15, 2009

People NEWS ENTERTAINMENT ROYALS LIFESTYLE STYLEWATCH SHOPPING

Chesley 'Sully' Sullenberger Flies Again

The "Hero of the Hudson" begins his first day back on the job since saving Flight 1549

By Nicole Weisensee Egan | Published on October 1, 2009 10:30 AM



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Screenshot

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A Not So “Typical” Buyer’s Remorse Case Involving a Bank, a Real Estate Broker and an Appraiser

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LORRAINE SULLENBERGER

7

8 SUPERIOR COURT OF CALIFORNIA - COUNTY OF BUTTE

9

10

11 TYP, LLC, CHESLEY B. SULLENBERGER III, and LORRAINE SULLENBERGER,)
12) Plaintiffs,)
13))
14) v.)
15 GRUBB & ELLIS COMPANY, CHERIE HULLADE, STERLING SAVINGS BANK as)
16) successor in interest by merger to SONOMA)
17) NATIONAL BANK, BECKI ROBERTS, and)
DOES 1 through 10, inclusive,)
18) Defendants.)

FILE Superior Court of California
County of Butte
APR 23 2010
Randy Heger Clerk
Deputy

BY FAX
C 10-01879

CASE NO. 150077

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 COVENENT OF GOOD FAITH AND FAIR DEALING;
7. UNJUST ENRICHMENT;
8. NEGLIGENCE.

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Captain Sullenberger’s Key Allegations

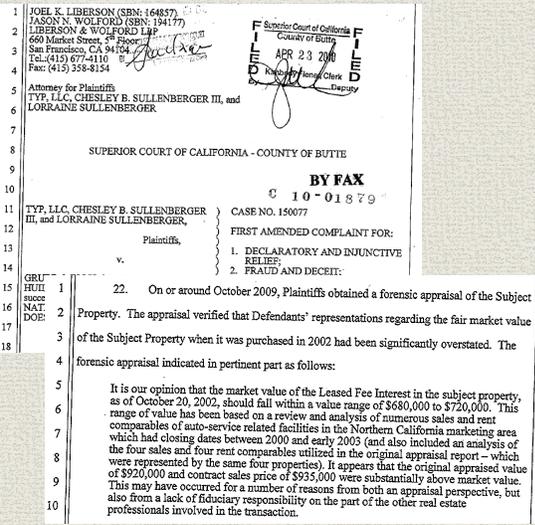
1 22. On or around October 2009, Plaintiffs obtained a forensic appraisal of the Subject
2 Property. The appraisal verified that Defendants’ representations regarding the fair market value
3 of the Subject Property when it was purchased in 2002 had been significantly overstated. The
4 forensic appraisal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

What would be the appraiser’s key point of defense?

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Wait ... What's the Statute of Limitations? Takeaway #1



The Sullenbergers purchased the property in 2002.

They filed their lawsuit 8 years later!

What's the statute of limitations for a professional negligence claim against an appraiser?

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 2011)
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	Yes, for claims with no	Louisiana 1 Yes; however, with an effective date of January 1, 2020, Louisiana has enacted a statute of limitations providing that any action against an appraiser or appraisal management company must be filed at the latest within three years from the date of the relevant act, omission or neglect.
Georgia	4	The limit applies has no	La. R.S. § 9-5610
Indiana	2	Yes	Me. Rev. Stat. Ann. Tit. 14, § 752
Iowa	2	Yes	Md. Cts. & Jud. Proc. Code Ann. § 5-101
Kansas	2	Yes	Mass. Ann. Laws ch. 260, § 4
Kentucky	1	Yes	Michigan 2 Yes, but the discovery rule is limited - an action must be filed within 6 months of the plaintiff's discovery of the claim.
Louisiana	1	Yes; however, with an effective date of January 1, 2020, Louisiana has enacted a statute of limitations providing that any action against an appraiser or appraisal management company must be filed at the latest within three years from the date of the relevant act, omission or neglect.	Minn. Stat. § 82B.24, Subd. 4 Yes; however, under Minn. Stat. § 82B.24, Subd. 4, an action must be filed no later than 6 years from the date of the appraisal.
Maine	6	Yes	Minn. Stat. § 82B.24, Subd. 4
Maryland	3	Yes	
Massachusetts	3	Yes	
Michigan	2	Yes, but the discovery rule is limited - an action must be filed within 6 months of the plaintiff's discovery of the claim.	
Minnesota	6	Yes; however, under Minn. Stat. § 82B.24, Subd. 4, an action must be filed no later than 6 years from the date of the appraisal.	

Takeaway #2 – 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 #2 – 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. ↵

Does the appraiser win the motion to dismiss the case? Yes or no.

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Takeaway #2 – The Value of Precise Intended Use and User Language *Willemsen* – 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 Willemsen'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 Willemsen 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 #2 – The Value of Precise Intended Use and User Language *Willemsen* – 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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What's the "Biggest" Appraiser Liability Case in the History of the Universe? How Did it Resolve?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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

Plaintiffs,

v.

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

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

FIRST AMENDED COMPLAINT

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

JURY TRIAL DEMANDED



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

Each report stated:

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

➤ Ruling on negligence claim:
"the court finds neither FIRREA nor USPAP imposed a duty of care on Defendants in favor of Plaintiffs."

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Takeaway #3 – Understand Review Appraiser Liability to the Original Appraiser -- Let's Apply What We Just Learned to Another Real Appraiser Claim Situation

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



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Slide 20

A problem for appraisers on the URAR

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

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

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

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

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**Takeaway #4: Most Common Mistake:
The House is Not as Big as Reported
by the Appraiser**



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

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

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**Most Common Mistake:
The House is Not as Big as
Reported by the Appraiser**



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

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

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

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

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

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

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

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

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

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

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

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**Most Common Mistake:
The House is Not as Big as
Reported by the Appraiser**



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

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

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

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

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

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

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**Takeaway #4:
Most Common Mistake =
Square Footage of the Subject**

What happened in the case?

Takeaways:

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

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Takeaway #5 – Mitigating the Risk of Borrower Claims with Specific Additional Language

Takeaway #5:

- Appraisers should consider additional language in reports directed at claims by borrowers (and sellers).

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Suggested Language for for Residential Appraisers Regarding the URAR 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 #7

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 (formerly Benson's Wild Animal Farm) 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.
- **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 should lose because the other side's appraiser owes them no legal duty.**

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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 and did 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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Other Legal Issues for Appraisers?

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

- **Discrimination and bias.**

Takeaway #8 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)

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

➤ 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.

Gramm Leach Bliley Act (GLB) – a Privacy Claim

Column One: Bob Hope house in Palm Springs, long an architectural footnote, approaches masterpiece status



Architect John Lautner had the Bob Hope house built into a hillside overlooking Palm Springs. (Myung J. Chun / Los Angeles Times)

SUBSCRIBERS ARE RE

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11 iconic L.A. homes
Lloyd Wright, Neutra,

FOR SUBSCRIBERS
Sexual harassment a
unrest: The unravelin
Theater

FOR SUBSCRIBERS
Column: Hollywood i
But Hollywood is nev

California workers w
dying of an incurable

Working-class Echo F
battle parking night



Does the state find the appraiser violated the Gramm Leach Bliley Act? Yes or no.

Los Angeles Times

the inside with natural materials. Swan faucets, wallpaper and carpet are out. Quartzite flooring, African mahogany and Brazilian granite are in — as is the shape-shifting light that transforms the house during the course of the day.

With the project now in its final stages, the house is almost ready for its relaunch.



A view of the evening sky is visible through the circular opening above the house's courtyard. (Myung J. Chun / Los Angeles Times)

Takeaway #9: RESPA?

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

Can a residential lender require that you pay an \$18 “review fee” for each assignment made to 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 #9: 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 #9: 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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#10 – 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.

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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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How many appraisers have been sued for discrimination since 2020?

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What About Court Actions Since 2020 Involving Alleged Appraisal Discrimination



FHFA Valuation Modernization Summit



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

"Only" 10 Court Cases 2020-24

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

Observations Regarding Court Cases

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

February 14, 2024 | Washington, D.C.

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Takeaway #11 – Guard Against Improper References in Your Report Avoid this Appraiser's Copy/Paste Mistake

FHFA INSIGHTS

Home / Media / Blog / [Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary](#)

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

Key Takeaways

- Examples of overt references to race, ethnicity, and other prohibited bases under federal fair lending laws in appraisals and other property descriptions persist, indicating the continued presence of valuation bias.
- Ongoing failure to address appraiser consideration of prohibited factors like race, as indicated by prohibited 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.

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 article for Deschutes County, Oregon. The article title is "Deschutes County, Oregon" and it is from Wikipedia, the free encyclopedia. The "Demographics" section is highlighted, showing the "2000 census" data. The text in the screenshot is as follows:

Demographics [edit]

2000 census [edit]

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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#11 – 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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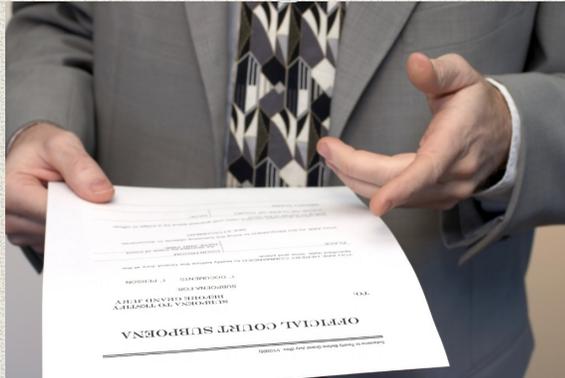
Takeaway # 12: Allegations of Discrimination Are Not Just a Residential Appraiser Issue – Examples of Recent Allegations of Discrimination Affecting Commercial Appraisers

- 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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#13 – 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.

...

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Takeaway #14 - 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.

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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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3 Pieces of Bad “Risk Management” Advice From the Internet

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

Are appraisers legally required to carry E&O insurance?

No, there is no such requirement in any state, except Colorado. What’s the real reason it exists? To defend you against claims.

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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.

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Do Appraisers' Limitations of Liability Work?

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

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Engagement Letters Really Work

The screenshot shows the website valuationregal.com. The main heading is "Appraiser Engagement Agreements". Below this, there is a section titled "Sample Materials for Services" with a "Login" button. The page content includes a paragraph about the author's preparation of example engagement agreements, a list of "Hot Topics" such as "Professional Practice Documents", "Common Appraisal Errors and Issues", and "Sample Materials for Services", and a section titled "Sample Materials for Services" which discusses the importance of written engagement agreements and provides a list of benefits.

I've prepared the following example engagement agreements for appraisers to consider in their practices. You'll find a complete discussion of engagement agreement details in Chapter 8 (Engagement Agreements and Appraisal Terms and Conditions) of my [book](#).

These materials are adaptations of the sample agreements made available by the Appraisal Institute on its website ([link](#)). I participated in the Appraisal Institute's work group that revised the materials available on its site in 2018.

Hot Topics

- Professional Practice Documents
- Common Appraisal Errors and Issues
- Sample Materials for Services
- Sample Certification Statements
- Use of Designations, Emblems, and Logo
- Readdressing, Reassigning, Reappraising
- Privacy Issues for Appraisers
- AI Reports
- Ethics and Standards
- PUCS

Sample Materials for Services

Although neither the Uniform Standards of Professional Appraisal Practice nor the Appraisal Institute Code of Professional Ethics requires the use of written engagement agreements, using a written agreement to set out the details of an assignment is a sound business practice.

A written agreement:

- serves to clarify terms of the assignment;
- provides written evidence of both the client and appraiser's agreement to the terms;
- provides the basis for the resolution of disputes arising from the providing of services; and
- encourages the parties to address issues that might not otherwise be addressed.

The Appraisal Institute is pleased to provide the following sample materials as resources for appraisers drafting their own engagement contracts in the non-litigation and litigation contexts. As drafted, the sample materials address non-litigation and litigation appraisal assignments, but they can easily be edited to accommodate review or other types of assignments. The sample materials are designed to be edited or modified as needed.

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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 #16 – Kindness Matters

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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