

# Appraiser Law in the Real World

Real Estate Appraiser Continuing Education  
4 CE Hours

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## About Your Instructor

Peter Christensen  
Attorney-Principal



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I'm an attorney, admitted to the bar in CA, MT and WA. I graduated from U.C. Berkeley's Law School.

My legal practice is entirely focused on 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. I've also taught in-person classes to over 45 Appraisal Institute chapters.

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

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## Our roadmap – where are we going?

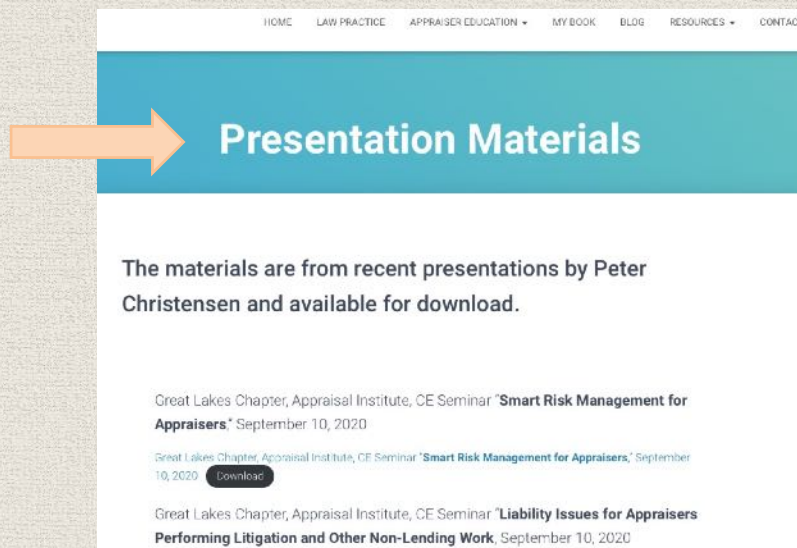
- We're going to look at a number of legal situations, cases and laws relating to appraisers and their firms.
- Key language in reports, statutes of limitation, defamation, engagement agreements, subpoenas.
- We'll see what we can learn about each subject.



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[www.valuationlegal.com](http://www.valuationlegal.com) under Resources tab



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

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

### What Is a Professional Negligence Claim?

The key legal elements of an appraisal negligence claim are:

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

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

Law in most states:

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

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

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### Example Case **Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**In 2008, a loan officer at First National Bank ("FNB") contacted a developer named Anthony Adams and asked him if Adams would be interested in looking at a property under development on Tybee Island, consisting of 25 residential lots.**



**FNB was trying to help the present development entity find someone to take over the property and to assume responsibility for a loan.**

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**Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**A somewhat complicated plan emerged.**

**Adams formed an entity named North Beach LLC that purchased the existing loan.**

**Adams and FNB understood that North Beach would foreclose on the property, purchase it in foreclosure, and then obtain a new development loan from FNB.**



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**Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**By letter dated April 4, 2008, FNB engaged a local appraisal firm and its appraiser to perform an appraisal of the property.**

**FNB's engagement letter described the function of the appraisal as follows: "Bank will rely upon this appraisal for internal use, including but not limited to, rendering a decision relative to a financial transaction."**

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**Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**Pursuant to the engagement letter, the retained appraiser appraised the property and prepared an appraisal report showing an “as is” valuation of \$5,000,000.**

**The report stated:**

**“This report is intended for use by . . . [FNB]. Use of this report by others is not intended by the appraiser. This report is intended only for use in providing data upon which the client may analyze the property as collateral for a mortgage loan. This report is not intended for any other use.”**

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**Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**The report also stated:**

**“It is our understanding [that] this appraisal will be utilized by the client as the basis for decision making purposes regarding the underwriting criteria for a mortgage loan.”**

**There were are also two key limiting conditions:**

**1. “No environmental site assessment (ESA) was provided to the appraiser. The site is assumed to be free of any contamination of any kind including any fill which may or may not exist.”**

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### **Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**2. “This development was built over an abandoned landfill. This valuation assumes that all environmental issues have been or will be resolved.”**

**North Beach initiated foreclosure proceedings and ultimately purchased the property at a foreclosure sale on May 6, 2008.**

**On the same day, FNB extended a loan to North Beach of about \$4 million develop the property.**

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### **Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)**

**North Beach never completed the project.**

**Work ceased due to buried waste on the site and the cost of the clean up work the City of Tybee Island demanded North Beach to perform.**

**Adams soon sued the appraiser and his firm alleging they overvalued the property and failed to account for the development problems stemming from the prior waste disposal on the site.**



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## Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)

The appraiser's testimony was:

- He knew nothing about North Beach and never met Adams until after Adams and North Beach filed their lawsuit against him.
- He did not intend for North Beach or Adams to use or rely upon his appraisal.
- He never gave the appraisal to anyone other than the employee at FNB who ordered it.

Poll: Who wins?

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## Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)

On a summary judgment motion, the trial court dismissed the case, and the court of appeal affirmed that dismissal. Why?

*"The evidence in this case establishes that [appraiser] knew a borrower existed, but it cannot support an inference that [appraiser] actually was aware that the borrower received the appraisal much less actually relied on it. Adams admitted that [appraiser] did not give him the appraisal. [Appraiser] did not know of North Beach and had not met Adams at the time he performed the appraisal, and he was not aware that anyone at FNB intended to give Adams the appraisal. The evidence also fails to raise an inference that [appraiser] intended for the borrower to rely on his appraisal."*

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## Adams v. DeWitt, 760 S.E.2d 191 (Ga. Ct. App. 2014)

*[Appraiser] stated that he did not intend for North Beach or Adams to use or rely upon his appraisal. The appraisal report, on its face, negates any such intention, stating expressly: "This report is intended for use by . . . [FNB]. Use of this report by others is not intended by the appraiser. This report is intended only for use in providing data upon which the client may analyze the property as collateral for a mortgage loan. This report is not intended for any other use."*

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## Significance of the Case?

- Intended use and user language in reports has paramount importance to the appraiser's ability to manage risk.
- Intended use and user language should be as precise and narrow as possible for each assignment.
- But also – you should not contradict precise intended use and user language by conduct – such as, for example, engaging in detailed discussions about the appraisal with a borrower or seller prior to the transaction (of course, that could violate USPAP also).

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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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## Very Bad Intended Use Language

No. Do not say this:

*The intended use of this appraisal is to provide an opinion of market value.*

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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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**Good Intended Use Language**

**Divorce Appraisal:**

*The intended use of this appraisal is to provide the client in this report with an opinion of the market value of the subject property for the named client's sole use in contesting the division of assets in the client's marital dissolution proceeding. The appraiser does not intend, know of or authorize any other use of this appraisal or content in this report. The appraisal and content of this report should not be used for any other purpose.*

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## Good Intended *User and Use* Language

### Lending Appraisal. 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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## Be Careful with Templates and Forms

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

APPRAISAL™		SUBJECT - SINGLE FAMILY HOME - 3BD / 2BA 411 S Schug St, Orange CA 92869	FILE NUMBER #141110-2447-1	CLIENT FILE ID# #7891665314-515
<b>INTENDED USER</b>				
The intended user of this report is the named Lender/Client. In some jurisdictions, e.g. Illinois, the AMC is considered an intended user.				
<b>The intended user of this report is the named Lender/Client. Use of this report by other parties is not intended or authorized by the appraiser. No other parties should use or rely on the appraisal for any purpose.</b>				
<b>INTENDED USE</b>				
The intended use of this appraisal report is to provide an opinion of the MARKET VALUE of the real property that is the subject of this report based on a sales comparison analysis, for the purposes as defined in this report.				
<b>The intended use of this appraisal is for the named Lender/Client's evaluation of the subject property as collateral for a mortgage loan to the borrower identified in the report. No other use is intended or authorized by the appraiser.</b>				

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## What About Residential Lending on the 1004?

**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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## My Most Important Risk Management Suggestion for Residential Appraisers Regarding the 1004

**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.

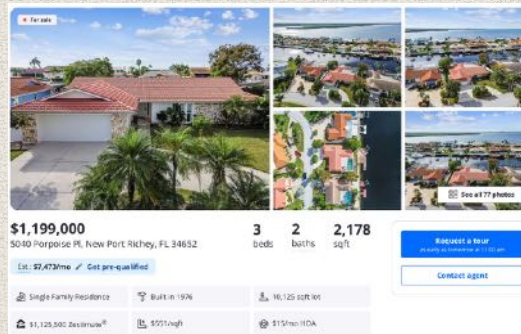
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## Statute of Limitations

*Carrington Capital Mgmt., LLC v. Wallace, Case No: 8:15-cv-1406-T-36AAS (M.D. Fla. Nov. 16, 2016)*

- Defendant appraiser Josie Wallace was first licensed as a Certified General Appraiser in Florida in 1990.
- In October 2005, Homequest Funding retained Wallace to appraise a residential property located at 5040 Porpoise Place in New Port Richey.
- Wallace valued the property at \$660,000 as of **October 12, 2005**.
- Homequest sold the mortgage to Citi Mortgage, who later sold it to plaintiff Carrington Capital.
- The borrower defaulted on the loan.
- In November 2011 (6 years after the loan was made and the appraisal was performed), the property was sold through a short sale for \$307,000.



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## Statute of Limitations

*Carrington Capital Mgmt., LLC v. Wallace, Case No: 8:15-cv-1406-T-36AAS (M.D. Fla. Nov. 16, 2016)*

- Carrington alleges that it discovered errors in Wallace's 2005 Appraisal Report in June 2014, when it conducted a "quality control review."
- A year later, now almost 10 years after the appraisal, in June 2015, Carrington filed a lawsuit against the appraiser, asserting negligence and other claims. It sought \$200,000+ in damages.
- Each cause of action was premised on Wallace allegedly having breached various standards, including the Uniform Standards of Professional Appraisal Practice and requirements in the Freddie-Mac Single-Family Seller Servicer Guide.

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### Statute of Limitations

*Carrington Capital Mgmt., LLC v. Wallace, Case No: 8:15-cv-1406-T-36AAS (M.D. Fla. Nov. 16, 2016)*

- The appraiser filed a motion to dismiss based on Florida's statute of limitations.
- What happens? **Who wins?**

**Professional Malpractice Statute of Limitations (applicable in 2015 when the case was filed)**

In its pertinent part, § 95.11 states:

(4) WITHIN TWO YEARS.—

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.  
[Fla. Stat. § 95.11\(4\)\(a\).](#)

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### Statute of Limitations

*Carrington Capital Mgmt., LLC v. Wallace, Case No: 8:15-cv-1406-T-36AAS (M.D. Fla. Nov. 16, 2016)*

- The court found the claim accrued on November 28, 2011, which was the date the subject property was sold for a loss through a short sale – this is when the lender “discovered” or “should have discovered” its loss.
- Under the 2-year statute of limitations, given that the accrual date was November 28, 2011, Carrington's claims were time-barred on or about November 28, 2013 – two years after discovery.
- Carrington initiated the case on June 15, 2015 – too late.
- So, the appraiser won – but what's the big problem?
- Under the law, the appraiser in this case could have been sued over an 8-year old appraisal.
- Fortunately, **that's the old law**. What's new?

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## Florida's New Appraiser Statute of Limitations

What's new? Fla. Stat. § 95.371.

**2)** An action to recover damages from an appraiser or appraisal management company based on contract, tort, or other legal theory for an act or omission in the performance of appraisal services or appraisal management services must be brought within 2 years after the date that the alleged act or omission is discovered, or should have been discovered, but in no case shall such action be brought more than 4 years after the date the appraisal services or appraisal management services were performed, or should have been performed.

...

**(4)** This section does not apply to any administrative proceedings initiated by the board or department.

**(5)** This section does not apply to any action founded upon fraud . . .

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## Statute of Limitations Chart Link [www.valuationlegal.com/limitations/](http://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 2015)
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 4, for claims by others	Yes, to the extent of the statute of limitations.	La. R.S. § 9:5810
Georgia	4	The statute of limitations applies.	Me. Rev. Stat. Ann. Tit. 14, § 752
Indiana	2	Yes	Md. Cts. & Jud. Proc. Code Ann. § 5-131
Iowa	2	Yes	Mass. Ann. Laws ch. 280, § 4
Kansas	2	Yes	MCL 600.5806(1) and MCL 600.5806(2)
Kentucky	1	Yes	Minn. Stat. § 52B.24, Subd. 4
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 of the latest within three years from the date of the relevant act, omission or neglect.	
Maine	6	Yes	
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. § 52B.24, Subd. 4, an action must be filed no later than 6 years from the date of the appraisal.	

Screenshot

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### Let's Talk About Defamation

- Appraiser sues review appraiser for allegedly defamatory comments in a negative appraisal review.
- Manager of hotel sues appraiser over appraiser's comments in appraisal report.
- Appraiser sues borrowers who accused him of racial bias for slander.

#### What's defamation?

- A false statement about someone that harms their reputation. If it's spoken, then it's slander. If it's written, then it's libel.
- There are key defenses/privileges – here are some key ones:
  1. Statements to law enforcement and investigative agencies.
  2. Statements made in or related to litigation.
  3. **Common interest privilege.**

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### Let's Consider One of My Favorite Appraiser Lawsuits

- Not exactly your everyday case, but it will help us understand appraiser lawsuit claims.
- You might think I'm making this stuff up, but the citation to the real case is: *Cabanas v. Gloodt Associates, Inc.*, 942 F. Supp. 1295 (E.D. Cal. 1996).
- The Resort at Squaw Creek is a high-end resort hotel adjacent to the slopes of the Squaw Valley ski area near Lake Tahoe.
- The hotel opened in 1990.



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## Commercial Appraiser Lawsuit

- After two years of poor performance, the owners sought to restructure \$53 million of debt with a regional bank. To consider the debt restructuring, the bank engaged an appraisal firm and its principal appraiser to perform an updated appraisal of the resort.
- The appraiser produced a 400-page report for his client.
- In the report, the appraiser stated an opinion that part of the reason for **the hotel's poor performance was that it was being mismanaged by Benchmark.**
- He wrote in report that **Benchmark was not a "competent manager of the subject ski resort"** and further opined that the resort would be worth \$17.9 million more if managed properly.



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## Commercial Appraiser Lawsuit

- There was then meeting at the hotel with prospective new investors in the resort.
- Someone left the 400-page report in a vacated room.
- A housekeeper found the report and gave it to her supervisor.
- Eventually, a copy made its way to the manager.



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## Commercial Appraiser Lawsuit

- The hotel was sold to the new investors.
- They demanded changes in the management agreement that deprived the Cabanas company (Benchmark) of significant revenue.
- Cabanas and Benchmark believed that the investors had received the report and that their decisions were made because of the appraiser's statements.
- Cabanas and Benchmark sued the appraiser and his firm for negligence and for defamation – specifically, libel.
- The appraiser moves for dismissal of the libel claim.  
**Who wins?**

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## Commercial Appraiser Defamation Lawsuit

How did the court rule on the libel claim?

The court dismissed the libel claim based on the privilege/immunity called the “common interest privilege.”

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## Let's Look at Some Laws That Appraisers Sometimes Ask Me About

- **Gramm Leach Bliley Act**
- **RESPA**

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## 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).

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

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

\* 16 CFR 314.2 Definitions.

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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.
- Private 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.

Who enforces  
these  
requirements?  
CFPB

Are there any real  
cases involving  
appraisers?

\* 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 act in good faith with regard to the legitimate interests of the client in the use of confidential information and in the communication of assignment results. 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 Violation Claim



**Who wins?**



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## RESPA?

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

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

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

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## Real Estate Settlement Procedures Acts (RESPA)?

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

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

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

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

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

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

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## 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

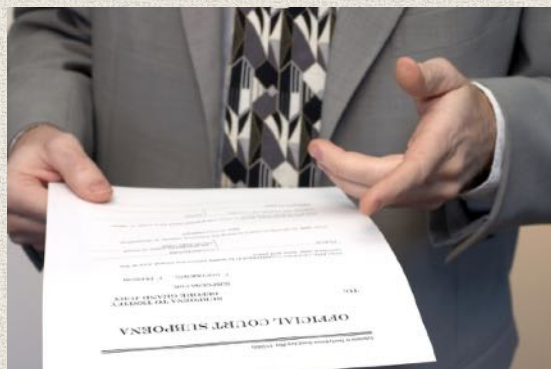
\* 12 USC § 2602 and 2607(a); 12 CFR § 1024.2 and 1024.14.

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## A Process Server is Knocking at Your Door

- What should you do?
- Flee to Montana?
- Accept service?
- 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.
- Court ruled USPAP confidentiality did not provide basis for appraiser refusing to disclose 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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## **USPAP Confidentiality**

### USPAP's Ethics Rule re Confidentiality

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

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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.

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## Example Letter re Subpoena

[Ms. Attorney]:

I am writing about the subpoena I received recently by mail from your office in regard to the above family court matter. Your letter accompanying the subpoena states that I am required to attend a trial involving your client \_\_\_\_\_.

I am a certified general appraiser, and your letter states that the subject of my testimony will be my February 2023 appraisal of \_\_\_\_\_. I have not, however, been retained as an expert witness by your office or by any party in the case.

Please understand the following with regard to my potential testimony. I respectfully ask that you withdraw your subpoena and/or cooperate with me in resolving these matters.

**1. Confidentiality and Intended User/Use of the Appraisal.** The appraisal was prepared exclusively for my client XXX Bank and Trust Company, and the intended use of the appraisal was limited to my client's consideration of its loan underwriting or credit decision making. This has two important impacts:

First, in \_\_\_\_\_, appraisers are legally required to abide by the Uniform Standards of Professional Appraisal Practice (USPAP). Under these standards, I have a duty of confidentiality to my client regarding the results of my appraisal and other confidential information. As noted above, I also have not been retained by any party as an expert. Accordingly, if I am called to testify, I will advise the court of my duty of confidentiality and ask the court to excuse me from testifying. I will not offer any testimony about the appraisal unless I am ordered to do so by the court.

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## Example Letter re Subpoena

Second, because appraisals are prepared under USPAP for specific clients and for specific intended uses, if I am called to testify, I will also advise the court and parties that I do not believe my appraisal should be considered in connection with your client's family law matter because it was prepared for a different party and for a different contemplated use. Under USPAP, a credible appraisal would need to consider the specifics of the proposed use and would need to be issued as of a particular effective date relevant to that use. Under no circumstances will I offer any testimony about the value of the property outside of value described in my prior report or on any other date of value. To do so, I would need to be retained (which I am not interested in) and would need to undertake the appraisal development required for a new assignment under USPAP.

**2. Compensation.** As mentioned above, I am a professional appraiser, and the subpoena seeks testimony about my professional work. My hourly rate is \$300 per hour.

Please confirm to me that you will be compensating me for my lost professional earnings and my professional time for the travel, waiting and testimony relating to your subpoena. If I am called and ordered by the court to testify, I will ask that this compensation be part of the court's order.

Other real-world objections may also exist: burden, improper services, trade secrets, consumer privacy, etc. ...

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



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

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## Appraiser's Divorce Assignment Goes South

- In 2017, wife and husband are in a contentious divorce.
- They own two properties: their home in West Covina and a 4-unit rental in La Puente.
- Appraiser runs into husband who says he needs an appraiser for his divorce case.
- **Mistake #1 happens – no engagement agreement.**
- Appraiser values both properties - \$835k for the home, and \$850k for the rental property, for which he later issues a new report at \$900k.

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## Appraiser's Divorce Assignment Goes South

- **Mistake #2** – appraiser reports both appraisals on standard Fannie Mae pre-printed report forms.
- **Mistake #3** – appraiser doesn't do a good job identifying his client/intended user in either report and just puts the last name.
- Wife agrees to a divorce settlement in court with the husband and claims she relied on the appraiser's reports in making the settlement.

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## Appraiser's Divorce Assignment Goes South

- The wife soon has regrets about the property settlement she accepted – another appraiser provides retrospective appraisals that are \$175k and \$205k lower.
- She files a complaint to BREa.
- **Mistake #4** – the appraiser doesn't report the disciplinary complaint to his E&O.
- BREa cites the appraiser. Let's look at part of the citation.

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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## The Appraiser Board's Findings re Appraisal of Home



- a) Respondent failed to consistently identify the intended use of the appraisal report.  
The report referred to the appraisal being used to estimate market value for purposes of marriage dissolution while the form defined the intended use as being for a mortgage finance transaction (S.R. 1-2(b) and S.R. 2-2(a)(ii));
- b) Respondent failed to develop a credible Sales Comparison Approach by:
  - i. Failing to explain the use of a sale price for Comparable One which was different than the sale price noted in public records;
  - ii. Failing to report the location of Comparable Two as being in a development with home-owner's association dues;
  - iii. Failing to report the equestrian facilities for Comparable Four; and
  - iv. Failing to provide adequate support for the site and car storage adjustments.
 (S.R. 1-4(a) and 3.R. 2-2(a)(viii));
- c) Based on the findings in a and b above, Respondent committed a series of errors that in the aggregate affects the credibility of the appraisal assignment results (S.R. 1-1(c));

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## Appraiser's Divorce Assignment Goes South

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

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## Appraiser's Divorce Assignment Goes South

- So, the appraiser is:
  - Having to defend a case at his own expense that is more difficult and expensive to defend because he didn't use good intended user language or an engagement agreement.
- **Takeaways** – use an engagement agreement, don't misuse report forms, do a good job specifying who your client is, and report legal issues promptly if you're insured.

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**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.
- ***There are two reasons why the property owner should lose.***

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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 both 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 lose is something called litigation privilege or witness immunity.

The case 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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## Who Else Sues Appraisers Engaged as "Experts" or Who Perform Other Non-Lending Work?

- **Client(s) of the Appraiser. Examples:**
  - Client in a divorce case disappointed with the result.
  - Taxpayer who hired appraiser to provide value for return.
  - Parties who jointly engaged appraiser to determine purchase price or a rental rate for a lease renewal.

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### 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.
- 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 Agreements Really Work

The screenshot shows the Appraisal Institute website. The main navigation bar includes links for Home, About Us, Practice, Publications, Professional Practice, News, Advocacy, and About Us. The 'Professional Practice' section is expanded, showing a list of documents including 'Professional Practice Documents', 'Common Appraisal Forms 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', and 'PUCS'. The 'Sample Materials for Services' document is highlighted, showing its title and a brief description: '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.' Below this, a section titled 'A written agreement:' lists three bullet points: 'serves to clarify terms of the assignment;', 'provides written evidence of both the client and appraiser's agreement to the terms;', and 'provides the basis for the resolution of disputes arising from the providing of services; and'. The final bullet point states: 'encourages the parties to address issues that might not otherwise be addressed.'

Sample agreements:

<https://www.valuationlegal.com/appraiser-engagement-agreements/>

What about limiting conditions?

<https://www.valuationlegal.com/appraisal-limiting-conditions/>

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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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## A Separate Agreement for Expert Witness Work

Re:  
[Name of matter or case]

Dear [Attorney]:

I/We are pleased to be retained by you as consulting experts in connection with your representation of \_\_\_\_\_ in the above matter. I/We also understand that I/we may be asked to provide expert witness services and testimony in the matter should it become necessary.

This engagement letter sets forth the terms of my/our services. If these arrangements are acceptable, please sign the enclosed copy of this letter, have your client sign it as well, and return it to me/us at your earliest opportunity along with the \$\_\_\_\_\_ retainer mentioned below.

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## A Separate Agreement for Expert Witness Work

**Responsibility for Payment.** *[See Instructions for alternative wording.]* I/we understand you are retaining my/our services in connection with the representation of your client. While we will be issuing our invoices directly to you for delivery to your client, your client shall be responsible for payment in accordance with the terms stated in this letter and has acknowledged that responsibility by signing below. However, in the event that your client fails to pay for our fees and expenses on a timely basis, your firm agrees to pay the balance owed.

**Retainer.** *[See Instructions for alternative wording.]* It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be \$\_\_\_\_\_. This retainer will be applied to my/our final invoice for time and expenses, with any unused amount refunded to the party who paid the retainer unless that party directs, in writing, that the refund be paid to a different party.

**Right to Withhold Services and/or Withdraw.** Without liability on my/our part and without regard to the stage of litigation, I/we shall have the right to withhold providing services (including delivering any report or providing testimony) or withdraw completely, at my/our sole option, if any of my/our invoices are not timely paid or if I/we determine that an irreconcilable conflict has arisen.

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## An Update on Alleged Appraisal Discrimination Matters

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[Blank]

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## Key Laws

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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## Notable Regulations under Fair Housing Act

- Implementing regulations under the Fair Housing Act, promulgated by HUD, broadly define the term “appraisal.”
- Under the regulations, appraisal means:
  - “an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.” 24 C.F.R. § 100.135(b).
- The definition includes not just appraisals, but also BPOs and AVMs.

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## Notable Regulations under Fair Housing Act

- The regulations also make clear it’s not just the appraising that may violate the law but it’s also “using” a discriminatory appraisal.
- Under the regulations, prohibited practices include:
  - “[u]sing an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.135(d)(1).

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## A Third Key Law

A third key law is emerging with CFPB investigations:

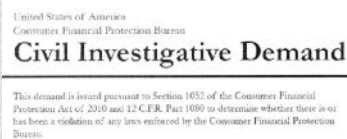
- Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any **Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs)**.
- CFPB February 2022 news release: “The CFPB is deeply troubled by the discriminatory statements the Federal Housing Finance Agency recently identified in some home appraisals, and the appraisal disparities for communities and borrowers of color recently found in both Freddie Mac and Fannie Mae studies.”



## Fair Housing Claims/Investigations

### Four Primary Pathways for Fair Housing and Discrimination Complaints and 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, ECOA and related legal claims.
4. And now – CFPB investigations.



#### Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether appraisers, and the lenders that rely on their appraisals, or associated persons, in connection with origination of home mortgages, have: (1) improperly relied on race, ethnicity, or national origin in their appraisals in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536; or (2) engaged in unlawful discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and Regulation B, 12 C.F.R. Part 1002. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.



## It's Not Just About Low Values

- While many of the stories so far have been about allegedly **low values**, that's not the only issue.
- Service standards and pricing of services are at issue too – and they can be lower hanging fruit.
- A complaint filed with HUD on 11-4-22 regarding an appraiser in Baltimore highlights the issue – a Black homeowner (a tester) had to wait 75 days for an appraisal while a White tester waited 17 days for an appraisal (and received a friendly note from the appraiser).
- Differences in ROV treatment are also now being investigated.



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## HUD Investigations

- HUD's Office of Fair Housing and Equal Opportunity (FHEO) handles the investigations.
- HUD provides notice of the complaint to the appraiser or other respondent and solicits a response (answer).
- Seeks to have the parties engage in a conciliation (settlement) process.
- HUD proceeds with the investigation and will generally issue a "Data Request."
- As the investigation proceeds, HUD may issue additional requests for information.
- The purpose is to determine whether reasonable cause exists to believe that discrimination occurred.
- 200+ complaints have been filed to HUD since 2020 alleging discrimination in appraisals.



**U.S. Department of Housing and Urban Development**  
 New York State Office  
 Jacob K. Javits Federal Building  
 26 Federal Plaza, Rm 3532  
 New York, New York 10278-0068  
<http://www.hud.gov/local/nyn/>

### INSTRUCTIONS

The response given to each of the below inquiries must be verified through the submission of supporting documentary, testimonial, electronic and/or any other available evidentiary means.

Whenever a provided response relies on witness testimony, Respondent must provide the name, address, telephone and/or cellphone number(s) and email(s) of that person. The evidence produced should not be redacted or altered in any way that modifies its content. Under no circumstances may Respondent withhold or fail to produce a piece of evidence that is in any way relevant to a HUD inquiry.

If Respondent is unable to fully answer any of the below-listed inquiries, please describe the nature of the information and explain the reason for being unable to do so while answering the inquiry to the fullest extent possible. In such instance, Respondent must still produce the requested information and documents through alternative protective measures or safeguards.

### DATA REQUEST

1. Identify the person(s) answering this Data Request and/or who contributed information that was used to answer any of its inquiries. If more than one person provided the answers or contributed information, identify the specific inquiries answered by each person and the information provided.
2. Provide a detailed response to the allegations made in the housing discrimination complaint, along with any supporting documentation.

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## Example Data Request from HUD

10. Provide all written communication between you and Complainant from [REDACTED] to the present that pertains to the appraisal at the subject property. Include the following:
- all communication (such as, but not limited to email messages, call logs, text messages, letters, etc.) to/from you or any person, or third party acting on your behalf from/to Complainant or anyone acting on her behalf from [REDACTED] to the present, including any communication pertaining to the appraisal at the subject property; and
  - any internal and/or external communication between you or any person, agent or third party acting on your behalf, (such as, but not limited to emails, letters, memos, text messages, notices, call logs, etc.), from [REDACTED] through the present that mentions or makes a direct or indirect reference to Complainant and the appraisal at the subject property.
11. For all residential appraisals completed by Respondent [REDACTED] between the period of [REDACTED] (including the appraisal of the subject property), provide:
- Property address
  - Race/National origin of the property owners
  - An indication as to whether or not the property owners were home at the time of the appraisal
  - Appraised value
  - Name of lender that ordered the appraisal
  - Whether the appraisal was for a refinance loan or the purchase of mortgage
  - Whether the property was a single-family home/detached dwelling, condominium unit, or townhome
  - [REDACTED]
12. Provide a list of all appraisals completed by Respondent [REDACTED] between the period of [REDACTED] that were revised after the initial report was given to the client. Include the race/national origin of the property owners, the reason for the revision, when the client was notified, and a copy of their initial and revised appraisals.

14. Describe the policy, procedures and process/steps in conducting an appraisal. Provide documentation.
15. If you are being represented by an attorney in this matter, please provide his/her point of contact information to include business address, phone number and email.

## Examples from other HUD data requests:

2. Provide appraisal reports (Uniform Residential Appraisal Reports; Form 1004) you completed between January 1, 2020- December 31, 2021.

5. Provide appraisal reports completed for African Americans between January 1, 2020 through December 31, 2021.

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## Results of HUD Investigations?

What is supposed to happen next in HUD's investigation process:

- At the conclusion of the investigation, HUD issues a determination about whether reasonable cause exists to believe discrimination has occurred and may then issue a "Charge of Discrimination."
- If a charge is issued, either side may decide to have the charge litigated in U.S. District Court. If neither party seeks that, then a trial may occur before a HUD administrative judge.
- Actual damages and civil penalties are available; punitive damages may only be awarded in federal court.

**All HUD Charges of Discrimination are published on its website:**

All Charges 2023	
Basis of Discrimination	
WARNING: The attached documents may contain graphic and explicit language that may be offensive to some readers.	
HUD Charges Landlord with Disability Discrimination <a href="#">Read the Charge</a>	9/25/2023
HUD Charges Landlord with Disability Discrimination <a href="#">Read the Charge</a>	9/18/2023
HUD Charges Nevada RV Resort with Discriminating Against Family with Minor Children <a href="#">Read the Charge</a>	9/14/2023

### Observations:

- No charges regarding appraisal discrimination published 2020-23.
- No substantive conclusions of investigations 2020-23.

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How many appraisers  
have been sued for  
discrimination since  
2020?

1-15    16-50    51-900

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Slide 90

## 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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## Reducing the Risk of Discrimination Claims

### Key Items to consider:

- Most common trait of appraisals in discrimination claims observed by me: basic errors, lack of true analysis and genuine summary, boilerplate work.

### From a recent HUD racial bias complaint:

██████████ erroneously reduced the Gross Living Area (sq footage) of my home to 2,874 sq ft, which decreased the value of her home. The assessor's property report card on File that Complainant received from ██████████ Tax Assessors Office on December 13, 2021 has her Gross Living Area (sq footage) recorded as 3,094 sq ft. This report card also provides sketch, site and building information among other things. This Gross Living Area (sq footage) for her home was available to the appraiser and he chose to blatantly ignore it, but he had no problem using the Gross Living Area (sq footage) listed online for the COMP Homes he used, which he didn't physically measure or inspect.

- Let's look at some things to make sure are getting right – most are actually easy.

## Federal Housing Finance Agency (FHFA) Study



### 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.



## Federal Housing Finance Agency (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 town was described as having a "Black race population above state average."

"Koreatown is considered 'highly diverse' ethnically."

"one spicy neighborhood."

A neighborhood described as "predominately Hispanic."

Noting that "there is more Asian influence of late" buying the market.

Noting the area's first Asian mayor.

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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## Federal Housing Finance Agency (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."

➤ Where did this come from?

### Carlisle, Arkansas

From Wikipedia, the free encyclopedia

**Carlisle** is a city in **Lonoke County, Arkansas**, United States. It is the easternmost municipality within the Little Rock–North Little Rock–Conway Metropolitan Statistical Area. Carlisle was incorporated in 1878. As of the 2010 census it had a population of 2,214.<sup>[3]</sup>

Contents [hide]

1 Geography
2 Demographics
2.1 2010
2.2 2000
3 Education
4 Notable
5 References
6 External

Coordinates: 34°47′10″N 91°44′41″W

**Carlisle, Arkansas**

City

Motto(s): "Land here"

2000 census

[ edit ]

As of the census<sup>[9]</sup> of 2000, there were 2,304 people, 955 households, and 645 families residing in the city. The population density was 471.7 inhabitants per square mile (182.1/km<sup>2</sup>). There were 1,029 housing units at an average density of 210.7 per square mile (81.4/km<sup>2</sup>). 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.

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## Where Did These Descriptions Come From?

Examples of problematic words and phrases found in appraisal reports:

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

➤ Where did this come from?



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## Looking for Discriminatory References

Examples words/phrases to be identified - common examples of words found in improper, potentially discriminatory text in appraisal reports.

These are examples only. Any words with similar effect should be identified if they can be understood as referring to the race or ethnicity of persons.

### Race/Ethnicity/Color

Black  
White  
Hispanic  
Chicano  
Minorities  
Culturally diverse  
Diverse  
Ethnically Diverse  
Integrated  
Spanish-Speaking

### National Origin

Indian  
Melting Pot  
Migrant Workers  
Nationality  
Seasonal Workers

### "Code Words"

Crime-Ridden Neighborhood  
Desirable Neighborhood  
Exclusive Neighborhood  
High Crime Area  
Prestigious Neighborhood  
Pride of Ownership  
Quality Neighborhood  
Traditional Neighborhood

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## Fair Housing Act, Section 3604(c)

“[I]t shall be unlawful —

...

c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

The test is whether the statement indicates discrimination to an "ordinary reader" or "ordinary listener."

This prohibition has been applied to appraisals.

Real-world example: “The neighborhood is a barrio.”

Case law indicates the statement must be related to the “**decisional process**” – no liability for just a “stray” remark.

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## Other Commonalities in Fair Housing Claims

- ROVs - most reported situations of alleged racial bias in residential appraising in 2020-22 began with the ROV process.
- Non-responsive stances create anger, complaints and claims: “The Appraiser’s opinion of value stands.”
- The appraiser’s “inspection-side manner.”



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Who wins the book?

**Thank You**

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