

# Liability Prevention for Real Estate Appraisers



**LIA Administrators & Insurance Services**

[www.liability.com](http://www.liability.com)

800-334-0652

# Today's Presenter

**Peter Christensen**  
**General Counsel**

**LIA Administrators & Insurance Services**

[peter@liability.com](mailto:peter@liability.com)

[www.liability.com](http://www.liability.com)

# Purpose of Seminar

- Update you on the most common liability issues that affect good appraisers -- so that you know the higher risk areas that actually cause claims.
- Leave you with the understanding that using plain English addressing property issues is very important, even more important than “boilerplate.”
- No magic language.
- Make you more defensible in court.
- Assure you that liability for appraisers is not out of control.

# Don't Trust Borrowers, Sellers or MLS



**Liability Insurance Administrators**

*Professionals Providing  
Real Estate Solutions*

## Importance of Disclosure



# Appraiser Liability Claims

## What Are We Talking About Here?

### Most Common Professional Liability Claims under AR Law:

- Professional Negligence

“In order to prove negligence, there must be a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. . . . The law of negligence requires as essential elements that the plaintiff show that a duty was owed and that the duty was breached.” *Marler v. Daniel*, 247 S.W.3d 473 (2007) (negligence case against divorce case appraiser).

- Fraud/Conspiracy

# Let's Consider a Real Appraiser Situation

- Review appraiser retained by lender prepares review that is highly critical of another appraiser's work and also opines to a significantly lower value.
- 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 and unsupported adjustments.
- In sum, the reviewer's review was negligent.
- Can the damaged appraiser who lost tens of thousands in income because of the negligent review sue the reviewer for damages? For negligence? For defamation?

# “Typical” Buyer’s Remorse Case

1 JOEL K. LIBERSON (SBN: 164857)  
2 JASON N. WOLFORD (SBN: 194177)  
3 LIBERSON & WOLFORD LLP  
4 660 Market Street, 5<sup>th</sup> Floor  
5 San Francisco, CA 94104  
6 Tel.: (415) 677-4110  
7 Fax: (415) 358-8154  
8  
9 Attorney for Plaintiffs  
10 TYP, LLC, CHESLEY B. SULLENBERGER III, and  
11 LORRAINE SULLENBERGER

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

8 SUPERIOR COURT OF CALIFORNIA - COUNTY OF BUTTE

9 BY FAX

10 C 10-01879

11 TYP, LLC, CHESLEY B. SULLENBERGER  
12 III, and LORRAINE SULLENBERGER,

13 Plaintiffs,

14 v.

15 GRUBB & ELLIS COMPANY, CHERIE  
16 HULLADE, STERLING SAVINGS BANK as  
17 successor in interest by merger to SONOMA  
18 NATIONAL BANK, BECKI ROBERTS, and  
DOES 1 through 10, inclusive,

Defendants.

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;



# “Wait . . . Can a *Third Party* Sue an Appraiser?”

The law differs by state on the extent to which appraisers are potentially liable to non-clients.

What is the law here in AR? There is no perfect line in the sand. “Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other.” *Marler v. Daniel*, 247 S.W.3d 473 (2007).

A large part of that inquiry concerns whether it was foreseeable by the appraiser that the third party would use or rely on the appraisal.

What goes into that evaluation? Intended user identification, known other users, communications, content of report, . . .

# “What Can I Do?”

Include a specific advisory in reports directed to purchasers/borrowers and sellers. Example:

*“The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal and no such party should use or rely on 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. This appraisal report should not serve as the basis for any property purchase decision or any appraisal contingency in a purchase agreement relating to the property.”*

# Recent Commercial Appraisal Case Willemsen v. Mitrosilis – CA Court of Appeal

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.

# Allegations from “Typical” Buyer’s Remorse Case

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

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

# “Wait . . . What About the Statute of Limitations? That appraisal was 8 years old.”

Statutes of limitation for claims against appraisers:

- Have no relationship to USPAP’s 5-year recordkeeping requirement
- May be subject to the “discovery rule”
- Are extended for the FDIC and some others
- Vary by state

So how long is it in AR? 3 years with a very limited “discovery rule” – highly protective compared to other states. Example case: *Varner v. Peterson Farms*, 371 F.3d 1011 (2004) (buyer’s remorse action filed in 2002 over a chicken farm purchased in 1996).

# Some Basic Pieces of Loss Prevention Advice

- Proofread reports
- Keep strong work files
- Keep them for longer than USPAP requires
- Be vigilant in identifying your clients, intended users and uses in your reports and cover letters
- Use plain English in your reports to describe conditions and issues that concern you – don't rely on canned phrases
- Follow your gut instinct about clients or situations that pose a high risk

# Who Sues Appraisers?

- Borrowers/purchasers (>50%)
- Lenders (small v. big, bank v. alternative lenders)
- FDIC
- Sellers
- Other parties
  - Other appraisers
  - Litigants (expert work)
  - Random third parties
- Very few AMCs (so far)



# Telltale of a Claim

- Telephone call
- Requests for information
- Subpoena for deposition testimony or documents (appraisal, work file)
- Administrative/licensing complaint
- Demand letter
- Served with a lawsuit



# A Word on Subpoenas

US v. 2,091. 712 ACRES OF LAND, U.S. District Court, Eastern District North Carolina 2010

“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.’ ”

# What To Do When It Happens?



- Don't ignore it
- Don't admit liability
- Report it
- If considering informal resolutions – a release is critical

# Residential Appraisers

## Most Common Bases of Claims (Non-Value)

- Square footage overstated, mismeasured (or didn't measure) the house.

*Example language: Appraiser notes that public building records, tax records and information supplied by the owner differ with respect to the square footage of the building structure. Floor plan is unique and difficult to measure. Appraiser's measurement is approximate.*

- Stated home served by sewer system, but it's on septic.

*Example language: Appraiser unable to verify whether property is serviced by sewer or septic due to inconsistent information provided in public records/data sources. Owner advises he thinks property is connected to public sewer. Further inspection recommended if the issue is considered material.*

# Residential Appraisers

## Most Common Bases of Claims (Non-Value)

- Construction progress reports

*Suggested language: This report is for the benefit of the lender to assist in making loan disbursements. It is not prepared for the benefit of the owner/borrower. The purpose of this inspection is to determine the approximate degree of completion and not the quality of construction, workmanship or materials.*

- Property condition items:

- Water damage, leaks
- Foundation/structural problems
- Termites, mold

# Commercial Appraisers

## Most Common Bases of Claims (Non-Value)

- Square footage errors
- Zoning
- Special property issues
  - Inability to develop, wetlands
- Income analysis
  - Overstated revenue
  - Understated expenses
- Vacant land

# Loss Prevention Advice

- Use language that limits your liability – clarifications of scope

*“This appraisal is prepared for mortgage lending purposes. It is not a home or building inspection report and it should not be relied upon to disclose conditions of the property.”*

# How Should the Appraiser Deal with This?



# All Appraisers – Value Claims

---

- Overvaluation

“I borrowed too much money”

“We paid too much for the property”

“We lent too much money”

- Undervaluation

“I can't refinance”

“The bank is restricting my line of credit”



# Claim Examples: Demand Letters

# How to Turn a Potential Claim into an Actual Claim

## Part 1 – Chase “Quality Review” Letter

Dear Appraiser:

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

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

# How to Turn a Potential Claim into an Actual Claim

## Part 2 – 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 . . .”**

# Borrower Demand Letter about a Roof Leak – 9 Years after Appraisal

Date: 10/20/2009

To whom this may concern:

My name is Patricia [REDACTED], and I purchased a home through [REDACTED] Mortgage in the year 2000. [REDACTED] was the person who appraised the property. This was a FHA loan 291-275 [REDACTED] (mortgage insurance case number). This home was said, **to have had a complete new roof, " Routine roof maintenance over ownership and complete replacement in 1999,"**

Last fall, I noticed I had some water damage on the outside and inside of my home. I contacted a contractor for an estimate and to evaluate the problem. I have sent 3 pictures, you can see there is mold growth in the ceiling.

If I do not hear from you within 30 days, I will file a complaint with FHA and if necessary I seek legal action.

yours truly,

*Patricia* [REDACTED]

Patricia [REDACTED]

[REDACTED]

[REDACTED] MO [REDACTED]

816-[REDACTED]

# Demand Letters from Provident Funding Regarding Repurchases

Provident Funding Associates, L.P.  
851 Traeger Avenue, Suite 100  
San Bruno, CA 94066

██████████, 2014

Dear Mr. ██████████

We are filing a claim against you as your appraisal of property ██████████ was relied on to make a loan decision. The borrower defaulted on the loan and Provident Funding Associates, L.P. was forced to indemnify the investor. A subsequent field review found numerous errors that significantly affected the credibility of the report.

Since the appraisal used in the loan decision was inaccurate, Provident Funding was required to compensate the investor. Provident Funding lost \$31,301.70. We request that you compensate Provident Funding for the loss as it was a result of an inaccurate appraisal completed by you, ██████████

Please find attached to this letter

- The original appraisal
- The field review

Please remit payment to:  
Provident Funding Associates, L.P.  
Attn: Accounting  
851 Traeger Avenue, Suite 100  
San Bruno, CA 94066

# Claim Examples

## Lawsuits

## Typical Lender “Overvaluation” Lawsuit against a Residential Appraiser

### THE SUBJECT LOANS –

#### TRANS. NO. 1 – THE ROGER [REDACTED] LOAN

41. On or about December 27, 2007, [REDACTED] lent \$405,000 to Roger [REDACTED] to refinance the property at [REDACTED] in Elk Grove, California, based upon the loan package BayCal prepared and submitted to [REDACTED]. (See the documents in Exhibit C).
42. BayCal chose Defendant Robert [REDACTED] to appraise the property, and he appraised it at \$540,000.
43. Based on that appraisal, [REDACTED] funded the loan and, subsequently, sold the loan to Fannie Mae.
44. But in July 2009, Fannie Mae demanded that [REDACTED] repurchase the Roger [REDACTED] loan package due to the Robert [REDACTED]'s negligent (or fraudulent) appraisal: the property's true market value at the time of the original appraisal was only \$370,000, as shown by a review appraisal. ([REDACTED] had inflated the property's true value by \$170,000 or 46%.)
45. As a direct result of his negligence (or fraud), [REDACTED] was forced to pay Fannie Mae \$185,372.94.

## Typical Lender “Overvaluation” Lawsuit against a Residential Appraiser

157. Robert ██████ failed to note in his appraisal that the property had been listed for \$519,000 and then reduced to \$484,000 between July 2060 and June 2007, and that the listing was withdrawn five months before his appraisal, after 354 days on the market.
158. Robert ██████ knew, or should have known, that ██████, or another lender, would rely upon his appraisal, since BayCal functioned as the mortgage broker and not as the ultimate buyer of the mortgage loan.
159. ██████ has incurred damages proximately caused by the Robert Peterson’s negligent appraisal in the amount of \$185,372.00, plus interest, attorney fees and costs.

WHEREFORE, ██████ Bank, FSB respectfully requests that this Court enter judgment in its favor and against appraiser Robert ██████ in the amount of at least \$185,372.00, together with costs, interest and attorneys fees.



# Uniform Residential Appraisal Report

File # 1019MOSA07(P)

There are **29** comparable properties currently offered for sale in the subject neighborhood ranging in sale price from \$ **257,000** to \$ **595,000**  
 There are **20** comparable sales in the subject neighborhood within the past twelve months ranging in sale price from \$ **250,000** to \$ **601,000**

FEATURE	SUBJECT	COMPARABLE SALE # 1	COMPARABLE SALE # 2	COMPARABLE SALE # 3	
Address	10184 Mosaic Way Elk Grove, CA 95757	8995 Corlino Way Elk Grove, CA 95757	6517 Oscar Circle Elk Grove, CA 95757	10287 Jenny Lynn Way Elk Grove, CA 95757	
Proximity to Subject		0.59 miles NE	0.38 miles E	0.47 miles SE	
Sale Price	\$ <b>Refinance</b>	\$ <b>595,000</b>	\$ <b>580,000</b>	\$ <b>500,000</b>	
Sale Price/Gross Liv. Area	\$ <b>sq.ft.</b>	\$ <b>205.28 sq.ft.</b>	\$ <b>237.39 sq.ft.</b>	\$ <b>214.13 sq.ft.</b>	
Data Source(s)		MLS# 70041770	Realist	Realist	
Verification Source(s)		NDC Data Doc # 557	NDC Data Doc # 257	NDC Data Doc # 1614	
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION +/- \$ Adjustment	DESCRIPTION +/- \$ Adjustment	DESCRIPTION +/- \$ Adjustment	
Sales or Financing Concessions		Conventional None	Conventional None	Conventional None	
Date of Sale/Time		6/21/2007 COE	7/12/2007 COE	5/22/2007 COE	
Location	Average	Average	Average	Average	
Leasehold/Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple	
Size	7,236 SF+/-	8,016 SF+/-	7,500 SF+/-	8,000 SF+/-	
View	None	None	None	None	
Drainage (Style)	Conventional	Conventional	Conventional	Conventional	
Quality of Construction	Average	Average	Average	Average	
Actual Age	3 Years	4 Years	3 Years	3 Years	
Condition	Average	Average	Average	Average	
Above Grade	Total Rooms Baths	Total Rooms Baths	Total Rooms Baths	Total Rooms Baths	
Room Count	7 4 3.00	7 4 3.00	7 4 3.00	8 4 3.00	
Gross Living Area	2,341 sq.ft.	2,650 sq.ft.	-12,700	2,325 sq.ft.	
Basement & Finished Rooms Below Grade	N/A N/A	None N/A	None N/A	None N/A	
Functional Utility	Average	Average	Average	Average	
Heating/Cooling	FAU/AC	FAU/AC	FAU/AC	FAU/AC	
Energy Efficient Items	Dual Pane	Dual Pane	Dual Pane	Dual Pane	
Garage/Carport	2 CarGar/1 Cpl	3 Car Garage	-2,500	3 Car Garage	-2,500
Porch/Patio/Deck	Cov Por/Patio	Cov Por/Patio		Cov Por/Patio	



**Liability Insurance Administrators**

ENDORSED BY:



*Professionals Providing Real Estate Solutions*

# Allegations from Recent Commercial Appraiser Lawsuit

24. Defendants' had performed an earlier draft appraisal for Okun on the Commercial Complex a few months prior to the appraisal of March 18, 2005. This earlier draft appraisal dated July 28, 2004, valued the Commercial Complex at \$29,000,000. When Mr. Okun expressed displeasure of the \$29,000,000 value and then represented that the power plant would produce future income in the amount of \$500,000 to \$600,000 annually for the Commercial Complex, the draft appraisal was changed to \$36,500,000. Mr. Okun was still not satisfied with the appraisal value of \$36,500,000 and represented to the Defendants that the future income from the power plant would be \$1,500,000 annually. Based solely upon these representations, Defendants increased the value in the draft appraisal to \$45,400,400.

# Who Sues Appraisers Engaged as “Experts” or Who Perform Other Non-Lending Work?

- Client(s) of the Appraiser. Examples:
  - Taxpayer who hired appraiser to provide value for return
  - Divorcing spouse who hired appraiser
  - Parties who jointly engaged appraiser to determine purchase price or a rental rate for a lease renewal
- Opposing Parties. Examples:
  - Divorcing spouse on the other side of the case
  - Opposing party who lost in litigation
  - Lender or borrower regarding appraisal for deficiency case
- Other Appraisers
  - Defamation, malicious prosecution, etc.

# What Are You Getting Into? Divorce Appraisal Assignment Leads to RICO Lawsuit Against Appraiser

United States District Court  
Middle District of Florida  
Tampa Division  
April 21, 2013

Robert C Courboin Plaintiff

v

8:

Candace Scott, Denise Wennogle, Scott and Daly, LLC,  
Candace Scott, LLC, James Jensen,  
Laufer, Dalena, Cadicina, Jensen and Boyd, LLC,  
Kalman A Barson, Barson Group,  
Arthur J Smith, Arthur J Smith Appraisals, LLC

# Divorce Appraisal Assignment Leads to RICO Lawsuit Against Appraiser

The attorney chosen experts are routinely stealing from their clients. Whether it's going to the attorney, which I am sure of and will find out, or pocketed by the "expert", it's definitely RICO related. Someone has to tell me how an attorney can recommend someone who charges almost twice as much, (real estate appraiser), and almost 8 times as much, (business appraiser), without getting a "cut". Keep in mind here that during the fuel shortage of 2011, our government (you) went after people who charged 10% more for gas. Unless something is done here I have to assume that the entire legal system is corrupt by allowing thievery.

3. (attached-d) Invoice and appraisal from Arthur Smith Appraisals for \$550 to appraise martial residence on 7/31/2009. Smith was hired by ex's attorney, Candace Scott. Please note the illegal, antique forms(software) used by Smith: Fannie Mae form 1004 6-93 on the forms. These forms (software) are not legal for loan appraisals since 2006.

Ex's cost, through an attorney-----\$550 for a bogus appraisal by an unlisted appraiser  
Note the Black and White pictures and general quality of his work.

# Divorce Appraisal Assignment Leads to RICO Lawsuit Against Appraiser

4. (Attached –e) Invoice and appraisal from New Jersey Appraisals for \$350 to also appraise martial residence at exact same time, 8-5-2009. Note that the forms(software) used: Fannie Mae Form 1004 March 2005. These are the only legal loan forms allowed since 2006.  
My cost. Negotiated----\$350, for a modern, legal done by an appraiser who advertises and has a phone number on the appraisal.  
Note color pictures, modern mapping, etc.
5. (attached-f) 2010 and 2011 Morris County, NJ yellow pages. Please note the listing for New Jersey Appraisal and lack of listing for Arthur Smith Appraisals.

My demands are simple,

1. I want the stolen \$200,000 returned, three fold.
2. I want the entire Civil Law component of NJ Law looked at for anti-trust acts and criminal proceeding brought against any instances found which resemble my charges.
3. I want to be paid for my time fighting these thieves.
4. I demand damages under the Sherman Act, which doesn't limit me to "treble damages".
5. I would like the Court to find or appoint a local expert to examine the books of the named firms so that total independence could be assured. Named firms would be required to forward requested documents to Florida, instead of availability to a NJ accountant.

# Basic Liability Prevention for Non-Lending Work Starts with a Good Engagement Letter

- Carefully define scope of work,
- Narrowly define intended users and use of report.
- Very clearly limit use to intended use,
- Get the date of value from the client,
- Consider limitations of liability, and
- Consider special limitations of liability



# Engagement Letters

Intended User(s). The only intended user of the appraisal shall be Client, unless Appraiser expressly identifies additional parties as intended users in the appraisal report. Appraiser does not intend or anticipate that any other parties will use or rely on the appraisal.





# Engagement Letters

Date of Value. The subject property is to be valued as of [specific date or date of performance of the appraisal]. Client confirms and agrees that Appraiser is not responsible for determining whether the date of value requested by Client is appropriate for Client's intended use of the appraisal.



# Engagement Letters

Appraisal Conditions. The appraisal(s) performed under this Agreement will be subject to all statements, assumptions, limiting conditions and other conditions (collectively, “Appraisal Conditions”) set forth in the appraisal report(s). Client agrees that Client will review the Appraisal Conditions upon receipt of the report(s) and that Client’s use of the appraisal(s) will constitute acceptance of the Appraisal Conditions. . .

# Engagement Letters

Limitations of Liability. Appraiser and Client agree that . . . each party's and its Personnel's maximum aggregate and joint liability to the other party for any and all claims or causes of action relating to this Agreement or to appraisals or other services under this Agreement shall be limited to the compensation paid to Appraiser for the services that are the subject of the claim(s) or cause(s) of action.

# Your Best Defense Tools

- **A Diligent Appraisal – and**
- **A Good Work File**
  - Organization and appearance matter
  - Photos, photos, photos
  - Documentation of anything out of the ordinary
    - Special instructions, responses to questions
    - Zoning issues
    - Blue prints or plans reviewed by appraiser
  - Evidence of sales that were considered but not selected as comparables – to show you considered the sales a reviewer might say you should have used

# E&O Insurance

- Importance of Prior Acts Coverage
- Most Relevant Exclusions:
  - Supervised Work, Subcontractors, Trainees
  - Mold
  - Construction Progress Reports
  - Right-of-way work
  - Bond and debt offerings
- Tail/Extending Reporting Coverage

