

Learning from Your Colleagues' Legal Challenges

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Santa Barbara, CA

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Where Are We Going?

- We're going to look several recent lawsuits and legal situations involving appraisers.
- We'll see what we can learn from each of them and from them overall.
- We'll start with an introduction to the basic legal elements of a professional negligence claim – the most common legal claim against appraisers.

Appraiser Liability Claims

What Is a Professional Negligence Claim?

The key legal elements of a negligence claim:

- Duty owed by the defendant *to the plaintiff* to follow a certain standard of care.
- Breach of that duty – e.g., providing an inflated valuation or failing to produce a USPAP-compliant appraisal or failing to report something that peer appraisers would have reported.
- Reliance by the plaintiff on the appraiser's work.
- Actual damages to the plaintiff.

Case #1 – Miami Appraiser Sued The House is Not as Big as He Reported (Filed June 5, 2020)

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

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

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

Case #1 – Miami Appraiser Sued

The House is Not as Big as He Reported

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

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

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

Case #1 – Miami Appraiser Sued

The House is Not as Big as He Reported

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

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

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

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

Case #1 – Miami Appraiser Sued

The House is Not as Big as He Reported

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

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

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

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

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

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

Case #1 – Miami Appraiser Sued The House is Not as Big as He Reported

Takeaways:

- Borrowers are the most common claimants.
- Square footage errors are the single-most common actual mistakes for which appraisers are sued.
- Pay extra attention to measuring and reporting square footage.
- Use additional language in reports directed at claims by borrowers (and sellers).

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 to those parties they know or reasonably expect will use or rely on their work.

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.

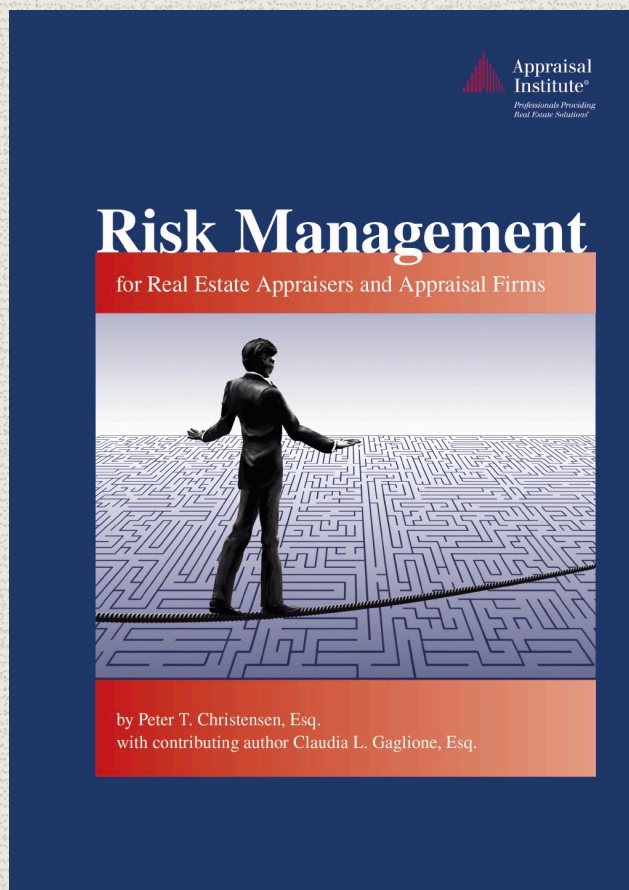
My Risk Management Suggestion for Residential Appraisers Regarding the 1004?

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.

Drawing for a “prize”



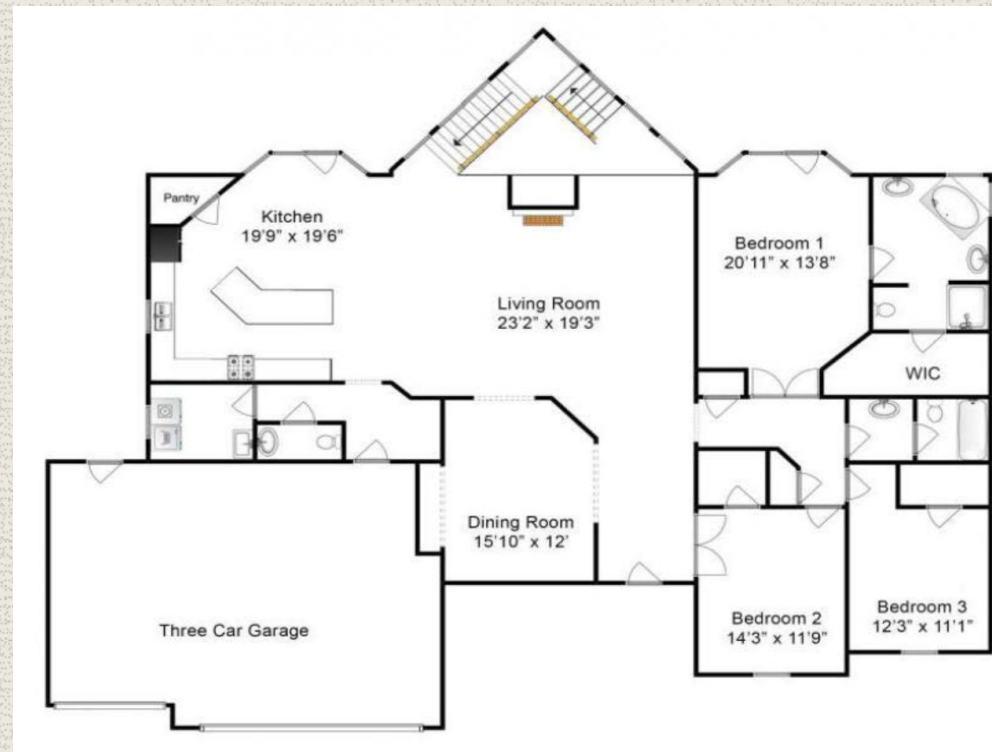
**You must be
conscious and
alert to win!**

Case #2

Do Appraiser Floor Plans Violate Copyright Law?

- Appraisers often create floor plans of the structures located on properties they appraise and include those floor plans in their reports. Many times, it's an assignment condition.
- Companies are selling services that utilize walk-through videos taken by appraisers and other parties to create interior plans that depict precise room measurements and layouts.
- Do such floor plans potentially violate copyrights held by the designers of the houses and buildings?
- This questions was posed to a federal appellate court last summer – and the answer didn't come out the right way for professionals and companies that create and use floor plans of existing structures in their work.
- The decision is entitled ***Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.***, 9 F.4th 803 (8th Cir. 2021).
- The losing defendants – brokers and agents – asked the U.S. Supreme Court to consider the issue but the Court didn't take the case.

Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.



Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.

Main Fin. Sq. Ft. 2,341

Lower Fin. Sq. Ft. 1,600

Total Fin. Sq. Ft. 3,941



Directions: South on Bethel to Right on Sudbury to Left on Melrose.



4306 Melrose Drive

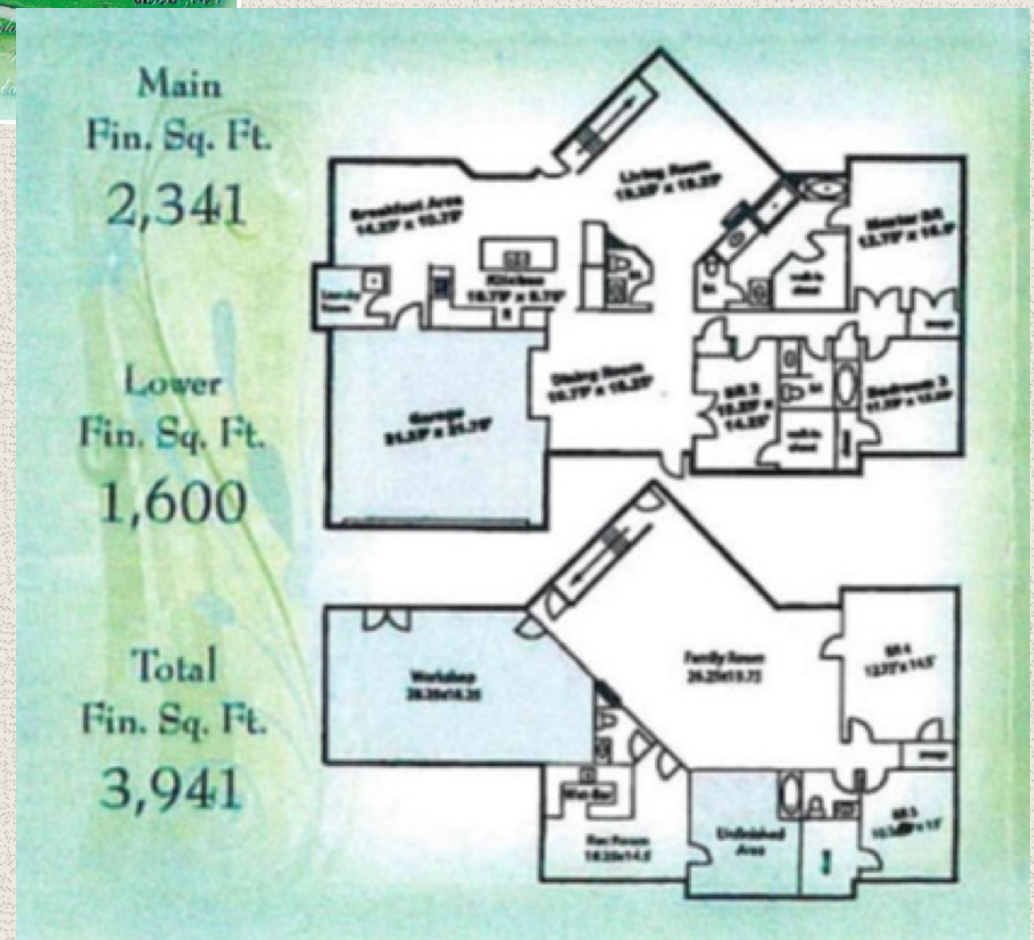
\$350,000

SUSAN HORAK REALTOR
Columbia House of Brokers Realty, Inc.

3422 S. Rock Quarry Rd. Columbia, MO 65201
Office: (573) 875-8889 Email: susan@designworkshomes.com
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Residence: (573) 875-8888 Email: susan@designworkshomes.com

4306 Melrose Drive

4306 Melrose Drive
Columbia, Missouri



Appraisal Language re Measurements and Floorplans?

Consider something like this:

The appraiser's measurement and reporting of square footage, as well as any sketches or floor plans included in the report, are solely for the purpose of the appraiser's analysis and should not be used or relied on by any party in connection with a different purpose, such as (without limitation) for a property purchase decision or determining a sales price. A property purchaser, borrower or seller should engage a professional of their own choosing, such as an architect or contractor, if the measurement of the property or a sketch or floor plan is needed for their own use.

Any measurements, sketches or floor plans included in this report may not be republished or distributed outside of the report, such as in connection with a listing of the property or in other sales information.

The Worst Risk Management Strategy I've Ever Heard

“I put all my assets in my wife's name”

Case #3

While We're on the Subject of Divorce

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

_____, an individual

Plaintiff,

vs.

_____, an individual and
DOES 1 to 20, inclusive,

Defendants.

Case No.:

198 _____

COMPLAINT FOR:

- (1) NEGLIGENCE**
- (2) NEGLIGENCE MISREPRESENTATION**
- (3) FRAUD**
- (4) VIOLATION OF B&P CODE SEC. 17200
ET. SEQ.**

Appraiser's Divorce Assignment Goes Bad

- 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.

Appraiser's Divorce Assignment Goes Bad

- Mistake #2 happens – 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.

Appraiser's Divorce Assignment Goes Bad

- 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 BREAA.
- Mistake #4 – the appraiser doesn't report the disciplinary complaint to his E&O.
- BREAA cites the appraiser.

BREA Findings re Appraisal of Home

Slide 22

- 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 S.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));

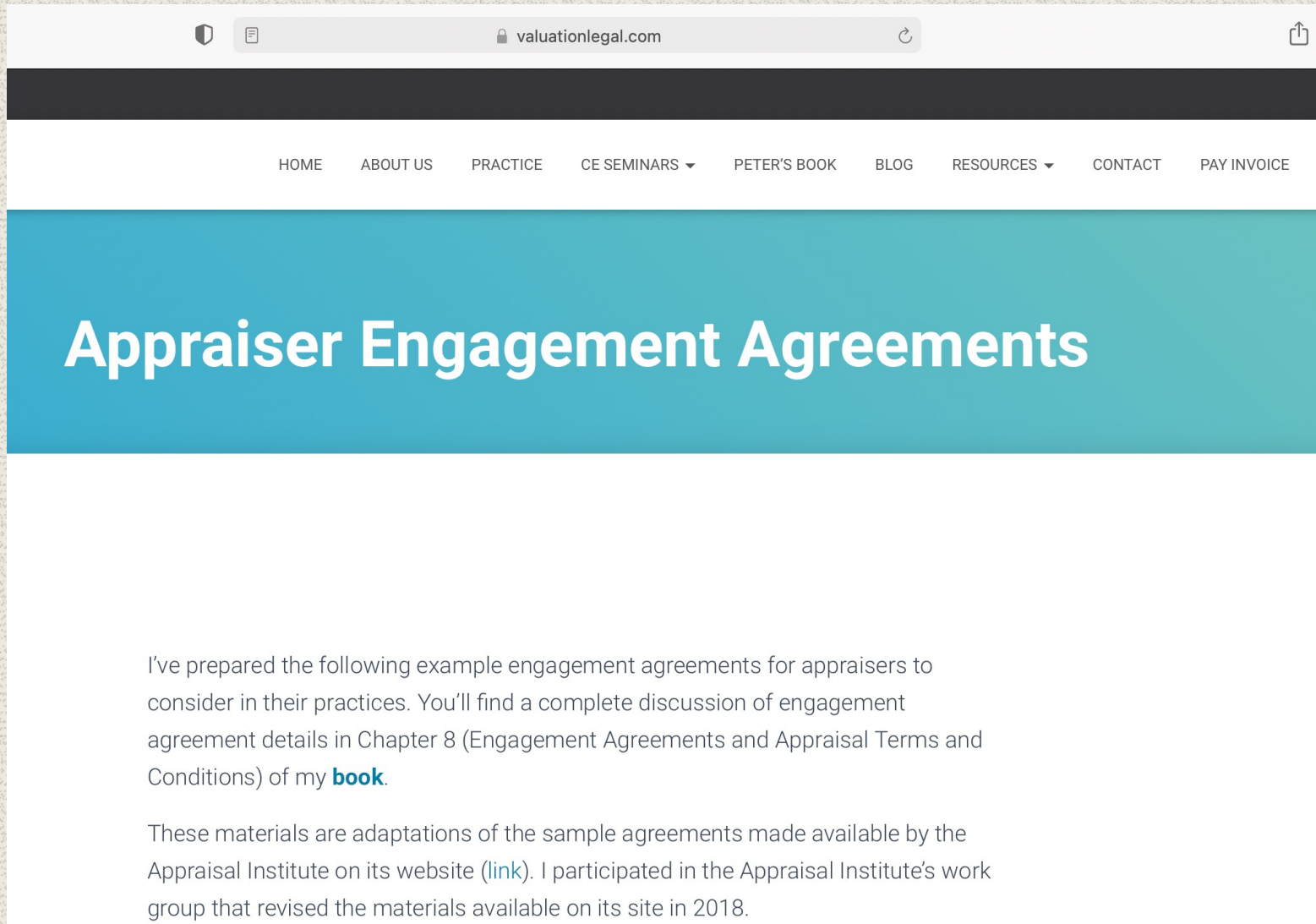
Appraiser's Divorce Assignment Goes Bad

- BREAA 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.

Appraiser's Divorce Assignment Goes Bad

- So, the appraiser is:
 - Having to defend a case at his own expense that is more difficult, expensive to defend because he didn't use good intended user language or an engagement agreement.
- Ultimately he does win. Why? In essence, under California law, an unhappy party on one side of a case can't sue witnesses or other participants in the case, including expert witnesses. (Exceptions exist for suing your own lawyer, your own expert and for malicious prosecution.)
- Lessons – 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.

Where to Find Sample Engagement Letters



The screenshot shows a web browser window with the address bar displaying 'valuationlegal.com'. The website has a navigation menu with links: HOME, ABOUT US, PRACTICE, CE SEMINARS, PETER'S BOOK, BLOG, RESOURCES, CONTACT, and PAY INVOICE. Below the navigation menu is a large teal banner with the text 'Appraiser Engagement Agreements' in white. Below the banner, the text reads: 'I've prepared the following example engagement agreements for appraisers to consider in their practices. You'll find a complete discussion of engagement agreement details in Chapter 8 (Engagement Agreements and Appraisal Terms and Conditions) of my [book](#).' Below this, it says: 'These materials are adaptations of the sample agreements made available by the Appraisal Institute on its website ([link](#)). I participated in the Appraisal Institute's work group that revised the materials available on its site in 2018.'

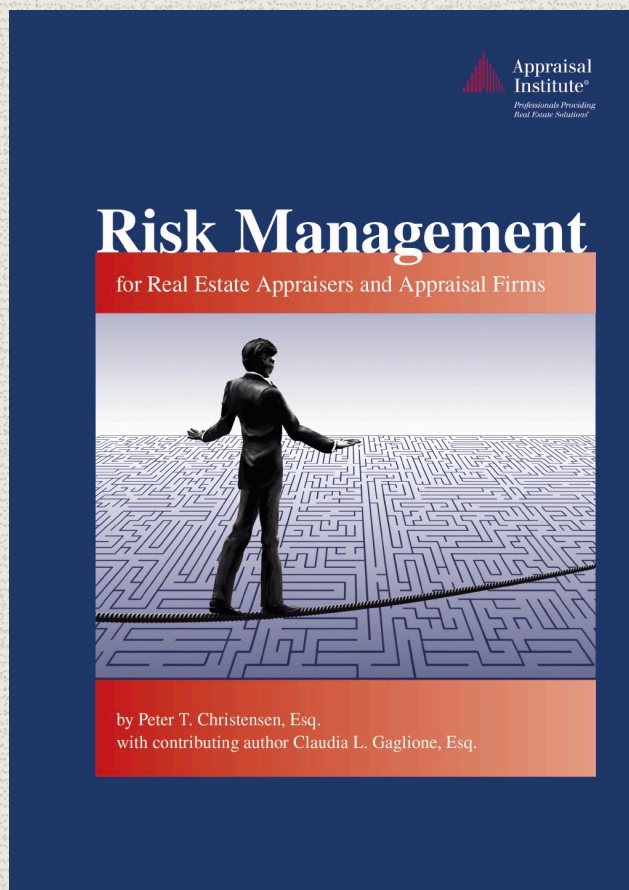
HOME ABOUT US PRACTICE CE SEMINARS PETER'S BOOK BLOG RESOURCES CONTACT PAY INVOICE

Appraiser Engagement Agreements

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

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Drawing for a “prize”



**You must be
conscious and
alert to win!**

Case #4

What About that Limitation of Liability? Do Appraisers' Limitations of Liability Work?

- Let's consider a NY case – Stabilis Fund II LLC v. CBRE, Inc., (N.Y. Sup. Ct. 2019).
- Defendant appraised a commercial property in default for a lender pursuant to a written engagement letter in October 2013 shortly before a foreclosure sale.
- The appraisal fee was \$2,500.
- The crux of the claim is that the appraiser made a clear error in the report. He failed to include rental income from a 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.
- Lender then sued the appraisal firm for \$1.1 million.

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?

Do Appraisers' Limitations of Liability Work?

- 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.”
- Court found: “that [the appraiser] made a calculation error by inserting an incorrect number in a spreadsheet does not constitute intentional wrongdoing.”
- Court rules: “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.”

Case #5 – the Fair Housing Claim/Investigation

Two key federal laws:

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

“It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” (42 U.S.C. § 3605(a).)

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



Case #6 – the Fair Housing Claim/Investigation

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

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

United States of America
Consumer Financial Protection Bureau

Civil Investigative Demand

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

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.

Some Historical Perspective on Discrimination Complaints Against Appraisers

From the data of 6,200 claims, court complaints and disciplinary matters involving appraisers in all 50 states from 2002-2018:

- 4 complaints to HUD about allegedly discriminatory appraisals.
- 10 complaints to state agencies, including appraiser boards.
- 2 lawsuits alleging violations of Fair Housing Act or other forms of discrimination.

2020 to the present?

- Far more complaints to HUD and state agencies than in those 16 years. (100+ complaints to HUD.)

But:

- HUD – So far, no charges of discrimination involving appraisals issued 2020 to the present.
- HUD – So far, only one conciliation agreement publicly reported (3-8-21) during this period.
- Still only a few actual lawsuits asserting legal claims.

Reducing the Risk of Bias Claims

Key Items to consider:

- Most common trait of appraisals in discrimination claims observed by me: deficient work quality/negligence, lack of true analysis, boilerplate work.
- Most residential situations involving alleged racial bias in 2020-21 began with the ROV process. Non-responsive stances create anger and claims: “The Appraiser’s opinion of value stands.”
- Take a Fair Housing class.
- But let’s look at one easy issue to fix.

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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"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

Coordinates:  34°47′10″N 91°44′41″W﻿ / ﻿

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.^[3]

Contents [\[hide\]](#)

- [Geography](#)
- [Demography](#)
 - [2.1 2010](#)
 - [2.2 2000](#)
- [Education](#)
- [Notable people](#)
- [References](#)
- [External links](#)

Carlisle, Arkansas

City

Motto(s): "Land here"



2000 census [\[edit\]](#)

As of the [census](#)^[9] 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/km²). There were 1,029 housing units at an average density of 210.7 per square mile (81.4/km²). 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.

Federal Housing Finance Agency (FHFA) Study

Examples of problematic words and phrases found in appraisal reports:

An area that was "originally founded as a whites-only city or sundown town" but had become "fairly diverse" with a "diverse school system."

➤ **Where did this wording come from?**

Culver City, California

From Wikipedia, the free encyclopedia

Culver City is a city in [Los Angeles County, California](#). As of the 2020 census, the population was 40,779. Founded in 1917 as a "whites only" [Sundown Town](#),^[7] it is now a multicultural city with what was called the "third-most diverse school district in California" in 2020.^[8]

Thank You

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