

California Residential Appraising: “Hot” Legal Issues

Southern California Chapter of the Appraisal Institute
Residential Symposium
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What Are We Going to Talk About?

- ✓ Most important recent appraiser case:
Willemsen 2014
- ✓ How California residential appraisers can build in some key language based on the case
- ✓ A very recent, but unpublished new decision
- ✓ Very common alleged error that results in claims
- ✓ Hybrid appraisal concerns
- ✓ Answers to your questions!



Who Sues Residential Appraisers Over Appraisals for Loans?

Most common:

- Borrowers/purchasers (>50%)
- Lenders/mortgage investors

Less common:

- Property sellers
- Very few AMC's



Negligent Misrepresentation Primary Legal Claim by Non-Clients

Professional may be liable to third parties when:

- Professional supplies false information for the guidance of third party – meaning professional knew or reasonably expected that third party would use or rely on the information;
- Professional failed to exercise due care in developing or communicating information;
- Third party justifiably relies on the information; and
- Third party suffers damages as proximate result.

Key Recent Commercial Appraisal Case *Willemsen* – CA Court of Appeal (2014)

- Willemsen contracted to purchase 4.8 acre vacant land in San Bernardino County in 2007.
- Purchase price \$1.6m.
- F&M Bank hired appraisers.
- Appraisers valued property at \$1.78m.
- Several years later, Willemsen was unhappy with purchase and sued.
- Alleged value inflated because appraisers failed to consider impact of earthquake fault and easement.
- But the appraisal had some key language:



Key Recent Commercial Appraisal Case *Willemsen* – CA Court of Appeal (2014)

report stated: “The function of this appraisal report is to provide Farmers and Merchants Bank with a Summary Appraisal Report.” It further stated: “The intended use of this appraisal is to assist Farmers and Merchants Bank in analyzing a new loan for the subject property. The intended users of this appraisal are Farmers and Merchants Bank and/or its designated representatives.” Another portion of the report said: “The report may not be used for any purpose by any person other [than] the party to whom it is addressed without the written consent of the appraiser and the appraiser specifically disclaims any liability to such unauthorized third parties.” The appraisal report was addressed to the bank.

HOME FOR

HOME

Key Recent Commercial Appraisal Case *Willemsen* – CA Court of Appeal (2014)

- Trial court granted summary judgment and dismissed case.
- Court of appeal affirmed. Key finding:

“[The appraisers] did not manifest an intent to supply information for Willemsen's use in determining whether the property was suitable for his purposes. Rather, the appraisal report specifically limited its intended use to the use of the bank.”



What About Residential Appraisers?

- The 1004 form has some problems – key among them is certification #23.
- Appraisal contingency in a purchase agreement can be a further negative.
- Note: recent good, but unpublished case *Tindell v. Murphy* (NorCal chapter sent request for publication to Court of Appeal).
- What else can you do?



What About Residential Appraisers?

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.



Hot Topic: Square Footage Claims

- Number #1 actual specific error resulting in claims:
 - Get the measurement right
 - Double check your calculations and sketches
 - Proof for typos
 - Don't trust borrowers, sellers, MLS, public records
 - Use plain English for special situations:
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.



What Should the Appraiser Say About This?



Hybrid Valuations

- Appraisals that combine appraiser's valuation analysis with another party's inspection and/or with AVMs or automated tools.
- Main liability concerns:
 - Appraiser (and AMC) may be dragged into claim – typically by borrower – based on information supplied by the other parties.
 - Clarity of who provides and is responsible for particular information alleviates *some* of the liability risk.



Hybrid Valuations

- **Main liability concerns (cont'd):**
 - **Some of the new products are missing liability prevention ingredients. Key examples:**
 - **No statements that the report is not a home inspection.**
 - **Weak wording on intended use and intended user.**
 - **The worst forms just copy 1004 language.**
 - **As a general matter, the form designers don't take advantage of their freedom from the 1004 – they are not doing a good job in reducing potential liability not only for the appraiser, but also for their own companies and inspectors.**



Hybrid Valuations

- **Main liability concerns (cont'd):**
 - In performing certain hybrid appraisals, appraisers may:
 - Rely too heavily on automated tools built into the software platforms that create the reports.
 - Fail to create an adequate workfile with the required information and data to support (and perhaps later defend) their appraisal.
 - As far as liability and disciplinary risk, there is a big distinction between a hybrid valuation that a consumer may receive a copy of, versus one that will strictly be used internally.



Hybrid Valuations

The question most often posed by appraisers to us (as an E&O provider) about hybrid valuations:

➤ “Am I covered by my policy for doing them?”



Example Hybrid Valuation

APPRAISAL™

SUBJECT - SINGLE FAMILY HOME - 3BD / 2BA
411 S Schug St, Orange CA 92869

FILE NUMBER
#141110-2447-1

CLIENT FILE ID#
#7891665314-515

Appraisal Report



INSPECTION

Report Summary

OPINION OF MARKET VALUE

\$651,000

1 YR RISK OF DECLINE - ■ FORECAST

5.7% Very Low Risk



EXTERIOR PROPERTY CONDITIONS

Inspection provided by



C6

Major Repairs
Required

C5

Repairs
Needed

C4

Worn but
Adequate

C3

**Well
Maintained**

C2

Like New

C1

New



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Hybrid Valuations

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

APPRAISAL™

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FILE NUMBER
#141110-2447-1

CLIENT FILE ID#
#7891665314-515

INTENDED USER

The intended user of this report is the named Lender/Client. In some jurisdictions, e.g. Illinois, the AMC is considered an intended user.

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.

INTENDED USE

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.

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.



7 Basic Liability Prevention Tips

1. “Appraise” clients, parties and assignments for unreasonable risk – follow your survival instinct.
2. Focus on precise, narrow descriptions of intended use and intended user.
3. Proofread reports – even better, have another person proof them.
4. Get square footage right.
5. Disclose special conditions in plain English – don’t rely on canned phrases to explain unique issues.
6. Always use the standard language about appraiser is not a home inspector and appraisal is not a home inspection.
7. Keep good workfiles – for several years longer than required by USPAP.

