

Special Legal Issues for California Appraisers: New Case Law, Disasters, Hybrids and Weed

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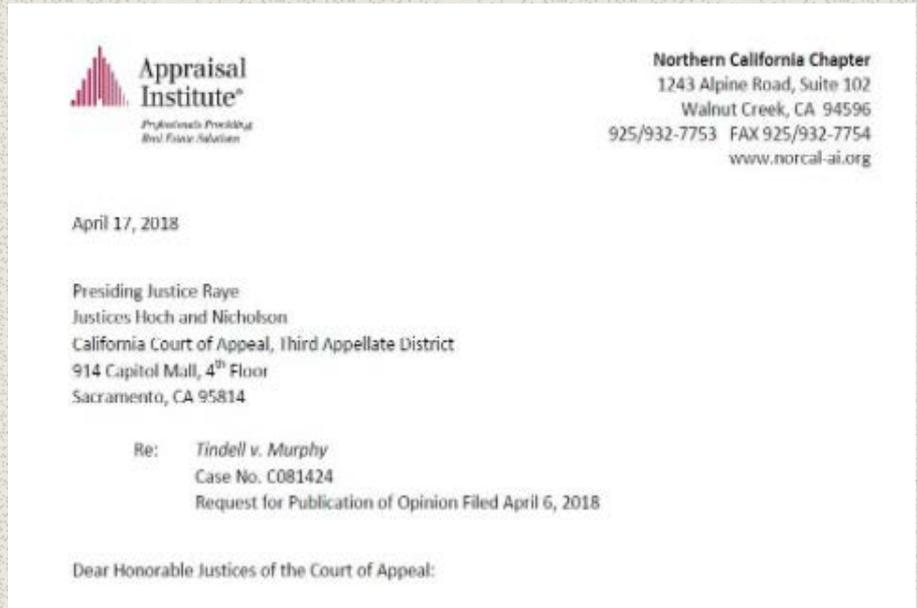
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Tindell v. Murphy (2018)

- On May 7, 2018, the California Court of Appeal, Third Appellate District certified for publication its decision in a case entitled *Tindell v. Murphy*.
- The case involved mortgage borrowers who sued a real estate appraiser blaming the appraiser for a purchase they made in 2005.
- There was, in fact, a real mistake in the appraisal: the appraiser failed to recognize that the home was originally a manufactured home.
- The trial court, however, dismissed the borrowers' suit because they were not intended by the appraiser to use the appraisal, as the appraisal was prepared for the lender.

Tindell v. Murphy

- The Court of Appeal upheld that decision in a straightforward opinion.
- However, the opinion was not originally slated for publication, meaning that it would not serve as precedent for cases involving other appraisers.
- Since the case was in Northern California, we worked with the chapter there to get the case published.



Tindell v. Murphy

Key points from the case:

- Extends the general reasoning of *Willemssen* to appraisals in the residential lending context.
- Gives clear recognition to the importance of an appraiser's identification of intended users – as the Court wrote:

“We are not convinced by the Tindells' efforts to distinguish Willemssen. As the trial court noted, the appraisal was prepared for the lender, not the Tindells.”

What Should I Do?

- Use precise, narrow intended use and user language in every report.
- 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. Receipt of a copy of the appraisal by such a party or any other third party does not mean that the party is an intended user of the appraisal. 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.”

- Be consistent with the above in all communications and documents.

Good Intended Use and User Language Really Is a Key to Decreasing Liability Risk

never describe intended use like this:

The intended use of this appraisal report is to provide an opinion of market value of the real property that is the subject of this report.

Or this:

Intended use: for internal decision-making.

Intended Use and User Language

If the appraisal is for a divorce, say something like this instead:

The intended use of this appraisal is to provide the client in this report with an opinion of the fair market value of the subject property for the 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.

Appraising After a Natural Disaster

Are there claims?

- In general, we do **not** see appraisers face professional liability claims from disaster-specific work in any significant volume.
- What we do sometimes see are liability claims relating to the “regular” appraisal work performed in the wake of a disaster:
 - Appraisal for a lender/client to appraise a property immediately after a disaster for new loan or for other lending purposes, or
 - Re-inspection or “recertification” of the value of a property that was appraised before the disaster.

Key Liability Prevention Measures for Appraising After a Natural Disaster

- If damage is observed during the inspection, the appraiser should:
 - specifically describe what they have observed – just use plain English,
 - consider whether the appraisal should be “subject to” repair, and
 - and take and provide extra photos.
- We’ve never defended a case against an appraiser in our insurance program in which we, the defense attorneys or the defense appraisal expert felt the appraiser took too many photos.
- Consider some additional language:

Appraiser is not a building inspector, contractor or engineer. Appraiser conducted a visual inspection of only the accessible areas. Appraiser makes no guarantees about the structural integrity of the property and assumes no adverse conditions exist. An expert should be consulted and further inspection conducted if there are any concerns about structural integrity.

Hybrid Appraisal Risks

- 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 Appraisal Risks

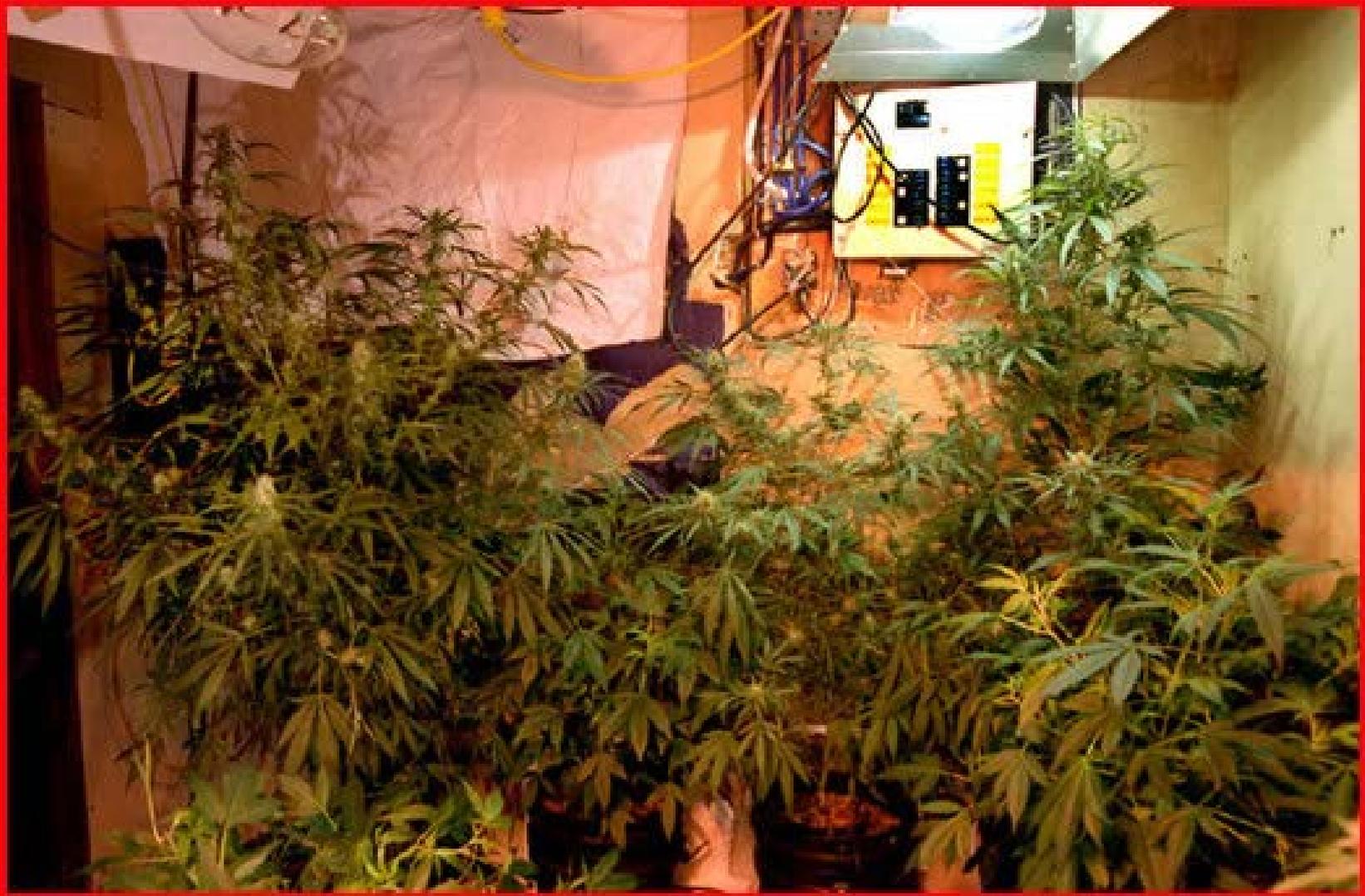
- Main liability concerns (cont'd):
 - In performing certain hybrid appraisals, appraisers may:
 - Rely too heavily on automated tools built into the software platforms that create the reports.
 - Fail to create an adequate work file with the required information and data to support (and perhaps later 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 Appraisal Risks

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

- “Am I covered by my E&O policy for doing them?”

What about this situation?



What about this situation?

Informal poll:

- 1. In the last five years, who has ever appraised a marijuana-specific property (greenhouse, processing facility, distribution location, etc.) for the purpose of a loan?**
- 2. In the last five years, who has ever seen marijuana on a property while appraising a property of any type?**

What does that tell us?

Watch for Peak Prices in a Bubble

Many of the hardest appraisals to defend are those that appraisers did just after the peak of the bubble.

- Failing to react to the peak despite obvious signs.
- Using older and older comps, without time adjustment, to support the value.
- There have been some local bubbles in commercial real estate for marijuana facility use.
- Values decreased in micro-markets when land use plans changed in the local political environment.
 - Adjacent property owners pushing for change.
 - Different personalities on a county board of supervisors or city government.

Example of a Local Regulatory Disaster

- In 2016, thinking it was getting a jump on competition from other counties for future business, Calaveras County passed a local ordinance allowing marijuana growers to apply for permits in the county.
- County voters also approved Measure C, a cultivation tax.
- Growers flocked to the county, purchased the right properties in the permitted areas and made investments.
- Prices increased on certain types of properties.
- The county also collected nearly \$12 million in permit fees and taxes from growers.
- But when a shakeup of the Board of Supervisors occurred, the Board authorized that an Environmental Impact Report (EIR) be conducted and as a result of the EIR, the board summarily banned all commercial cannabis operations in the county.

**So, what about this situation?
What should the appraiser do on regular
lending appraisal?**



Use Plain English Disclosures

Example disclosure: “*The appraiser observed approximately 60 plants believed to be marijuana growing in the basement under lighting strung from bare wires suspended from ceiling. See photos from basement.*”