

Appraisal Review - Avoiding "Reviewer" Liability

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Here's a trend in real estate law: attorneys are waking up to the potential liability of review appraisers. Couple this with the common misunderstanding among review appraisers that their risk is less than the author of the original report, and you get a burgeoning new area of litigation.

Here's how to protect yourself . . .

Why Reviewers Get Sued

In my practice review appraisers increasingly are being named as defendants in lawsuits. In the typical transaction, the review appraiser has a contractual relationship with the lender while the appraiser retained by the mortgage broker to perform the original report does not. Lenders usually include language shifting some of the risk of loss to the reviewer. Lender/reviewer contracts often contain provisions permitting the party prevailing in a lawsuit to recover court costs as well as the fees paid to lawyers.

Carefully read any contract you are asked to sign by a lender who is hiring you for review work. You may be able to negotiate out some of the more onerous provisions. As a rule, lenders tend to insist that appraisers on their approved list be covered by errors and omissions insurance. When a loan defaults, the lender, armed with the contractual language just discussed, sues the appraiser, confident that insurance coverage exists for the claim.

I frequently hear the common myth, "If I didn't have E & O insurance the lender would not sue me." Wrong. I often get calls from uninsured appraisers who have been sued. In fact, until you are sued, the lender cannot be absolutely sure whether coverage exists for the claim.

In my opinion, the need for E&O coverage has never been greater. The real estate market is strong in most areas of the country with non-performing loans being relatively rare. This being the case a lender may litigate even if the loss is modest.

Reviewer Liability

Another big myth is that reviewers have less liability than the original appraiser. In fact, I have heard some attorneys argue that reviewers have more liability than the original appraiser since reviewers have the "last" opportunity to correct any problems with the report.

While I am unaware of any case precedent specifically addressing this issue, logic dictates that the liability of a reviewer and the original appraiser are the same. Both the appraiser and the reviewer are performing the same task: opining on the fair market value of the subject property.

My reviewer clients argue that their liability should be less since reviewers typically do not view the interior of the property and may not drive by the comparable properties. I have never argued the "diminished liability" defense to a court but I suspect that it may fail.

The client of the reviewer relies on both the original report and on the review. Actually, in the customary refinance or purchase transaction, a lender may place greater reliance on the review because they usually hire an approved reviewer with whom they are familiar and have confidence.

Avoiding Reviewer Liability

Reviewers can be placed under tremendous pressure to concur with the value in the original report. You become the proverbial "rain on the parade" if you disagree. If that's the case so be it. Uncovering situations where the value is not there is the reason a review appraiser is hired.

Rest assured that if you agree with the original report and the loan defaults, the lender will send both reports to yet another appraiser to determine if there is any appraiser negligence.

Lenders and participants in the secondary loan market will often ask the original appraiser to consider other data to verify their report. Making adjustments to the value in your own report is risky unless you can defend it adequately.

Never review a completed and delivered appraisal rendered by your own firm. All appraisers affiliated with one firm are treated as one entity for liability purposes. So, for the reason stated above, do not review the work of other appraisers in your firm.

Even if you agree with the value reached in the original report, include in your review any mathematical errors or substantive problems you found. This will demonstrate that you carefully reviewed the original report, considered the defects but concluded that they did not affect the value. Include any limitations imposed upon the review in the narrative portion of the review.

Bottom line: Review Appraisals should be performed with as much care as a complete report. With this in mind you can avoid reviewer liability.

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