CLAIM ALERT

# THE STATUTE OF LIMITATIONS FOR A CLAIM AGAINST AN APPRAISER:

## Why You Should Keep Your Workfile for 7 to 8 Years

In 2013, many lawsuits against both residential and commercial appraisers continue to relate to appraisals performed years ago at the peak of the real estate price bubble, 2005 to mid-2008. These lawsuits are filed by borrowers, lenders, investors or the FDIC and typically allege that an appraiser's inflated value resulted in the plaintiff borrowing, paying or loaning too much money. The plaintiff blames its loss on the appraiser and sues for damages.

When reporting a claim like this to our office, one of the most common questions a defendant appraiser will ask us is about the applicable statute of limitations. The question is usually something like: "I did the appraisal in 2005, more than five years ago. I threw out the workfile because USPAP only requires me to keep files for five years. Won't the lawsuit be dismissed based on the statute of limitations?" The answer to that question is almost always "probably not."

The purpose of this Claim Alert is to clear up misconceptions that appraisers read and hear regarding statutes of limitations and to advise appraisers about the importance of retaining workfiles well beyond USPAP's bare minimum recordkeeping requirement. A good workfile is the appraiser's defense tool kit when a claim comes in. Without that workfile in hand, the appraiser's defense counsel will usually be hampered in his or her ability to defend a claim. Our advice on this issue is simple: keep your workfile for seven to eight years (unless a longer period is required under USPAP's special requirement for assignments where the appraiser has provided testimony). The discussion that follows should help you understand why.

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**What is a Statute of Limitations?**

A statute of limitations is the time period set by law for a party to file a legal action against another party. In general, for most types of civil claims filed against appraisers, the relevant statutes of limitations fall under state law, and it is generally the state in which the subject property is located that will determine the applicable state's law – for example, if you appraise a property located in California, California's law regarding statutes of limitation will almost always apply, unless you agreed in a contract to something different. Besides varying from state to state, the relevant statute of limitations for a given claim against an appraiser is also going to vary based on the legal theory asserted (professional negligence, fraud, breach of contract, etc.).

The most common legal claim against an appraiser is for negligence. The shortest statute of limitations period for suing an appraiser based on a negligence theory is one year in Kentucky, and the longest period is 10 years in Rhode Island.

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**The FDIC's Special Extension**

Given the recent high number of lawsuits filed by the FDIC, as the receiver for failed banks, it is particularly relevant for appraisers that, under federal law, the FDIC receives a 3-year extension for negligence claims and other torts. In addition, the FDIC receives a 6-year extension for contract claims pertaining to any statutes of limitations that may apply to claims made as the receiver of a failed bank. These extension periods begin to run on the date the FDIC is appointed receiver of a failed bank. What this means is that if the statute of limitations under state law for a negligence claim that a bank could have made against an appraiser did not expire by the time the bank failed and the FDIC was appointed receiver, the FDIC will have up to 3 more years in which to file a lawsuit for negligence, or until the state limitations period would normally expire, whichever is longer.

**USPAP's Minimum Recordkeeping Requirement Does Not Affect the Statute of Limitations**

USPAP requires that an appraiser "retain the workfile for a period of at least five years after preparation or at least two years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last." This time period has no bearing on any statute of limitations for lawsuit claims against appraisers. It is simply irrelevant. Many appraisers are sued long after USPAP's minimum five-year recordkeeping period has expired.

**The "Discovery Rule"**


This is where an appraiser's hopes for an easy win based on the statute of limitations are often crushed. With regard to professional negligence claims, courts in a majority of states apply some version of what is called the "discovery rule" to determine when the applicable period begins to run. How the discovery rule will apply to a negligence claim varies from state to state, but the effect of the rule generally is that the time period will not start until the party filing the lawsuit against an appraiser should have discovered the problem with the appraisal. To help make that more understandable, here is an example: the relevant statute of limitations period for negligence in California is 2 years. The appraiser performed an appraisal of a home for a lender-client in 2007. The borrower defaulted and the lender foreclosed on the loan in 2011. At that point, the lender looked at the appraisal in the loan file and concluded the appraiser made an error. Under the discovery rule applied in California, the lender argued that its 2-year period for filing its lawsuit against the appraiser did not start until it learned of the appraiser's error in 2011. The defense counsel for the appraiser, of course, argued it started earlier and that a diligent lender should have been looking at the appraisal before the foreclosure. This is why we see so many claims about appraisals that are now 7 and 8 years old and why they are not easily dismissed.

**No Discovery Rule**

In the few states that do not follow a discovery rule, the time period will generally begin to run at the time the appraisal was performed/delivered or when the plaintiff incurred harm or damage as a result of the appraisal – these scenarios are generally more advantageous from a defendant appraiser's perspective.

**What is the Statute of Limitations Period for a Lawsuit Against an Appraiser in my State?**

Because there are so many permutations which vary from state-to-state and which also depend on the exact type of claim and whether a discovery rule is applied, we have prepared a 50-state chart to answer this question. A simplified version of the chart is included with this Claim Alert. This chart indicates the statute of limitations period for negligence claims in each state and whether a discovery rules applies. A more detailed and continuously updated chart is available on our appraiser liability prevention website www.readimember.org. The chart on that site indicates the statutory basis for the limitations period in each state and also provides the time periods for fraud and breach of contract claims. Appraisers who are insured by LIA can register on the site for access and view the chart by using their LIA customer ID number.


## TELL TALE CLAIMS...

**A Large Defendant Appraisal Firm Learns About the Discovery Rule in Washington**

In March 2005, the plaintiff borrowed money from a bank to purchase a property located on a small island in Washington state. A staff appraiser in a large appraisal firm performed the appraisal. More than three years later, in July 2008, the plaintiff was having problems with the property's waste disposal system and hired a contractor to investigate the issue. The contractor determined that the existing septic system was not operable and had not been operable since before 2005. The county public health department prohibited any further occupancy of the property until installation of an approved functional septic system. With repair costs estimated in the hundreds of thousands of dollars, the plaintiff determined that the property was essentially worthless and stopped making payments on his loan.

The borrower then sued the appraisal firm for negligent misrepresentation, alleging that its appraiser stated that the property was served by a working septic system and failed to identify or report the actual deficiency. The borrower filed this lawsuit in June 2011, more than six years after the original appraisal.

The appraisal firm moved to dismiss the case based on Washington's three-year statute of limitations period. The court hearing the motion pointed out that Washington follows the discovery rule and that the statute of limitations begins to run when the plaintiff "discovered or, in the exercise of due diligence, should have discovered the misrepresentation." Recognizing this rule, the appraisal firm argued that the borrower should have discovered the alleged negligence about the septic system issue at the time of closing or during the three years following the purchase. The court, however, found that there was no indication that plaintiff had any reason to suspect that the appraisal was negligently conducted or that he was aware of, but ignored, signs of an impending problem with the septic system prior to June 2008, when the contractor reported it to be inoperable. The court further stated that the "plaintiff was not required to take upon himself the tasks he reasonably believed [the appraisal firm] had performed."

The court ruled that the statute of limitations did not begin to run until June 2008 when the plaintiff first "had a reason to suspect that [appraisal firm's] appraisal was faulty." That date was within three years of when the borrower filed its lawsuit. Accordingly, the motion to dismiss was denied and the case advanced toward trial.

**Indiana Appraisers Win Even with Application of the "Discovery Rule"**

The existence of the discovery rule in most states does not mean that appraisers always lose on a statute of limitations defense. In a case filed in Indiana, the plaintiff bank had hired appraisers working together in a small firm to appraise 25 single family rental properties for loans to a single property investor in 2003. After receiving the appraisals, the bank actually questioned the values in some of the reports. In fact, the bank's vice-president would later testify that he "did not like these appraisals from the start," and the president of the bank admitted in his testimony that even "the average person" could conclude that the appraisals overvalued the properties just from looking at the photographs of the subject and comparable properties. The bank, however, decided to make the loans anyway based on the strength of the borrower's credit. In January 2004, apparently after looking at the appraisals further, the bank decided it would no longer use the appraisers (*i.e.*, the bank "blacklisted" them) and advised them of that fact. In 2006, the borrower defaulted and the bank suffered substantial monetary losses.

The bank filed a lawsuit against the appraisers in January 2007. After three years of litigation, the trial court granted summary judgment in favor of the appraiser defendants, ruling that the statute of limitations had expired on the bank's negligence claim. The bank then appealed.

In considering the appeal, the Indiana Court of Appeals recognized that Indiana's applicable statute of limitations for professional negligence is two years. The court then addressed the question of when does that period begin to run? Here, the Indiana court recognized that Indiana follows a "discovery rule." As the court explained, "Under Indiana's discovery rule . . . the statute of limitations begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury." However, as the trial court found and the appellate court agreed, the bank's two-year period in which to file a lawsuit began to run when the bank looked closely at the appraisals and decided that the problems in them merited discontinuing future use of the appraisers' services. That date was in January 2004 at the latest. Because the bank filed its complaint in January 2007, the bank's lawsuit was filed one year too late and the negligence claim was properly dismissed.

**A National Lender Gets Schooled in Ohio**

Only a very few states do not follow a discovery rule. Ohio is one of them and has a four-year statute of limitations period that begins to run at the time the appraiser performs the appraisal. In this case, a national lender sued a residential appraiser about three appraisals performed in 2001 and 2002 for three different loans which defaulted in 2003 and 2005. The lender blamed the appraiser for its financial losses on the loans but its lawyers did not bother to file a lawsuit until 2008 – seven years after the first appraisal. On appeal, the lender tried to argue to the Ohio Supreme Court that the statute of limitations should not begin to run until it discovers the full extent of the alleged damage it has allegedly incurred as the result of negligence in an appraisal. The Ohio Supreme Court ruled in favor of the appraiser. It confirmed that the period in Ohio begins to run when the appraisal is delivered, and it affirmed dismissal of the lender's claim because it filed the lawsuit years after that period had expired with respect to each appraisal.

**Conclusion**

Regardless of USPAP's minimum recordkeeping requirement, appraisers are advised to retain workfiles for 7-8 years as the minimum recordkeeping requirements are not synonymous with state specific statutes of limitations regarding claims against appraisers. Additionally, the "discovery rule" can extend the time a claim can be filed against an appraiser by years. Simply following USPAP's recordkeeping requirement will not provide a sufficient amount of protection against potential claims. Retaining workfiles for 7-8 years will supply an appraiser, and their defense counsel, the ability to effectively defend the appraisals they have completed against any claim that may arise.

| Statutes of Limitations for Appraiser Professional Negligence | | |
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| | **Statute of limitations period for a professional negligence claim against an appraiser (in years):** | **Is a "discovery rule" likely to be applied to a professional negligence claim?** |
| Alabama | 2 | No, unless fraud. |
| Alaska | 2 | Yes |
| Arizona | 2 | Yes |
| Arkansas | 3 | No, unless fraud. |
| California | 2 | Yes |
| Colorado | 2 | Yes |
| Connecticut | 2 | Yes |
| Delaware | 3 | Yes |
| Florida | 2 | Yes |
| Georgia | 2, but if the malpractice claim sounds in contract, a 4-year period may apply. | No, unless fraud. |
| Hawaii | 6 | No |
| Idaho | 2 | No |
| Illinois | 2 | Yes |
| Indiana | 2 | Yes |
| Iowa | 2 | Yes |
| Kansas | 2 | Yes |
| Kentucky | 1 | Yes |
| Louisiana | 1 | Undetermined |
| Maine | 6 | Yes |
| Maryland | 3 | Yes |
| Massachusetts | 3 | Yes |
| Michigan | 2 | Yes |
| Minnesota | 6 | Cause of action accrues when alleged negligence has occurred. |
| Mississippi | 3 | Undetermined |
| Missouri | 5 | Yes |
| Montana | 3 | Possibly |
| Nebraska | Unsettled | Undetermined |
| Nevada | 4 | Yes |
| New Hampshire | 3 | Yes |
| New Jersey | 6 | Yes |
| New Mexico | 4 | Yes |
| New York | 3 | No |
| North Carolina | 3 | Yes |
| North Dakota | 2 or 6 | Yes, within 2 years of discovery. |
| Ohio | 4 | No |
| Oklahoma | 2 | Yes |
| Oregon | 2 | Yes |
| Pennsylvania | 2 | Yes |
| Rhode Island | 10 | No |
| South Carolina | 3 | Yes |
| South Dakota | 3 | No |
| Tennessee | 3 | Yes |
| Texas | 2 | Yes |
| Utah | 4 | Yes |
| Vermont | 6 | Yes |
| Virginia | 5 | Yes |
| Washington | 3 | Yes |
| West Virginia | 2 | Yes |
| Wisconsin | 6 | Yes |
| Wyoming | 2 | Yes |

***Important Notice:***
*The information in this Claim Alert and chart is not legal advice and should not be relied upon in making legal decisions, including, but not limited to, deciding whether or when to file any legal action. You should consult with your own attorney with regard to any legal decisions. The information is also not to be construed as an admission of fact or law and is offered without prejudice to any legal position or defense of any party.*