

## Equal opportunity

Are AMC's as vulnerable to liability as appraisers?

by Peter T. Christensen

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The business of appraisal management has matured enough in the past 10 years that we can see clear patterns of liability risk for appraisal management companies. Those patterns show us that appraisers and AMC operators are in the same position when it comes to defending themselves against lawsuits, and I tell them they need to put aside their other differences when facing a legal quagmire.

It may come as a surprise to appraisers — and even to some AMC operators — that AMC's get sued. AMC's don't escape liability simply because the appraisals are performed by independent contractors; AMC's have their own legal responsibilities and "standards of care." In a few cases, the courts have viewed an AMC's liability just like that of a true appraisal firm, meaning the AMC was viewed as an appraisal firm that uses contractors rather than employees and therefore was fully liable for the appraisal work product.

More often, however, parties suing an AMC persuasively point to state appraisal management laws and industry practices as creating a standard of care for the AMC — the violation of which can serve as the basis for a negligence claim. Plaintiffs, in particular, point to the common language in many state laws obligating AMC's to ensure, or at least have a process in place designed to ensure, that appraisals are performed in compliance with the Uniform

Standards of Professional Appraisal Practice. Accordingly, AMC's are sued by lenders, borrowers, sellers and myriad other parties, and sometimes sued right alongside the appraiser.

An AMC's biggest liability risk — by a wide margin — is its exposure to claims by lending clients that seek to hold AMC's responsible for loan losses attributed to deficient appraisals. A growing trend involves lenders making claims not just over losses relating to loans in default, but also in relation to mortgage repurchases on performing loans. The trend is attributed to increased auditing by Fannie Mae of appraisals on current loans. When Fannie Mae observes an appraisal deficiency in violation of its loan-selling guidelines, it may force the originating lender to repurchase that loan. Some lenders then look to the AMC to be made whole for any loss connected with the mortgage repurchase.

Two common elements have popped up in larger claims that are more difficult to defend. The first is a failure of some defendant AMC's to appreciate that when a professional appraisal service such as a desktop review is commoditized into an inexpensive "product" with a quick turnaround, the same level of liability still attaches to the service as if it were performed on a non-commoditized basis. In other words, the conclusions and certifications in the report aren't diminished, and the AMC's representations, warranties and indemnification responsibilities don't disappear just because the service is a \$75 check-a-box review.

Another common element that's been observed across multiple claims is the selection of appraisers who clearly are not competent to handle certain assignments. In those situations, the biggest competency problems are related to commercial appraisals and properties outside of the experience of the panel

### About the Author



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appraiser, such as vacant development land or agricultural properties.

Lender claims present a bigger risk to AMC's, in general, than do claims from other sources because of the potential severity in the amount of a claimed loss. A single claim by a lender may involve losses on dozens of problem loans for which an AMC managed appraisals, resulting in a multimillion-dollar claim against the AMC.

Prudent risk management for AMC's involves consistently executing an appraisal quality control and review program that's designed to ensure clients receive compliant and credible valuations. Even then, however, some appraisals will be submitted that lenders will later claim to be deficient in the event of a mortgage default or a repurchase. For these essentially uncontrollable risks, an AMC needs to be prudent with its lender service agreement because many legal duties owed by an AMC to its clients remain contractual. In its service agreements, an AMC should pay special attention to:

- **Representations and warranties** with respect to compliance of appraisals with USPAP or GSE guidelines.
- **Overly broad indemnification obligations** in favor of the lender that go beyond the defense of third-party claims.

Some lenders — especially several of the largest — seek to push AMC's to accept financial responsibility “for any and all losses in any way related to” the managed appraisals, regardless of whether the issues are within the AMC's control. There are not many AMC's that have the financial wherewithal to back up promises like those. ◀



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