# Hazardous waters

## The specter of mass litigation directed at appraisers gets more frightening

by Peter T. Christensen

I first wrote about the mass litigation directed at appraisers in my fourth quarter 2014 "Rest Insured" column (http://bit.ly/1SgG74x). I noted then that the threat was just emerging. Now it's become a full-blown hazard to the entire valuation profession, and every appraiser needs to understand what's happening.

In 2014, three litigation "claim servicing" entities with common management filed about 120 professional liability cases against appraisers. In 2015, the number of new cases topped 300, almost all relating to loans held or serviced by one source — Impac Funding Corp. More than 600 individual appraisers and firms have been named as defendants in the lawsuits filed by Impac's claim servicers. In just two years, they have sued more appraisers than has the Federal Deposit Insurance Corp. in the past 10 years.

If these suits prove successful in the long term, they will permanently change appraisers' livelihoods and the valuation profession.

The lawsuits have so far only targeted residential appraisals, but appraisers and firms of every type: licensed and certified appraisers, former trainees, designated appraisers (including supervising appraisers and firm owners), retired appraisers and even the estates of deceased appraisers. If these suits prove successful in the long term, they will permanently change appraisers' livelihoods and the valuation profession.

As noted, almost all the mass litigation relates to loans held or serviced by Impac Funding Corp., a subsidiary of Impac Mortgage Holdings, which oversees a range of mortgage services. Impac has entered into a business arrangement with an entity named Savant LG, and under their contract, Impac has assigned the right to file lawsuits against appraisers in relation to potentially thousands of foreclosed loans. The purpose of the assignment is for Savant or other "claim servicing" entities working with Savant (entities formed for investing in the litigation and having names like Mutual First, First Mutual Group and Llano Financing Group) to pursue professional liability cases against the appraisers who performed appraisals for foreclosed loans. Most of the loans were originated from 2005 to 2007, and many of the foreclosures took place four or more years ago.

Under a contract between Impac and Savant, Impac retains the right to direct certain aspects of the litigation and receives a percentage of the recovery. However, Impac, Savant, Mutual First, First Mutual and Llano Financing have so far been a failure. By the end of 2015, more than 135 cases had been dismissed without any recovery against defendant appraisers. There may have been a few cases in which they succeeded in obtaining a settlement, but I have reviewed hundreds of the cases and haven't seen any judgment against an appraiser, except in cases where the appraiser defaulted and failed to defend the case.

Impac and its subservicers should not be underestimated. They are refining their tactics, getting better organized, and changing their legal and factual theories. In one recent development, mortgage pool investment entities bearing Impac's own name have replaced Llano Financing as the named plaintiff in some cases. The new plaintiff entities have variations of the name "Impac Secured Assets Corp., Mortgage Pass-Through Certificates, Series II," which

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actually own the loans at issue in each case, according to the amended complaints.

Should Impac and the others responsible for this litigation succeed, we surely will see more mass litigation efforts and major changes for appraisers and their liability exposure. Appraisers could find it difficult to afford professional liability insurance, and policies could start to exclude coverage for appraisal work for specific lenders. When a similar phenomenon occurred several years ago in Australia, appraisers saw individual E&O rates rise to more than $20,000 per year, in some cases, and policies often excluded coverage for claims by particular parties. In the United States, some appraisers have policies that exclude or limit coverage for claims by the FDIC; this exclusion was implemented by some insurance providers in response to the large number of lawsuits filed by the FDIC from 2008 to 2012. I suspect the industry will see one or more of the same insurers introduce policies that exclude or limit coverage for claims relating to Impac itself, or more generally relating to entities that engage in similar types of "subserviced" mass litigation.

The bottom line is that appraisers don't — and perhaps can't — pay premiums sufficient enough to cover the liability exposure associated with positions taken by Impac's "subservicers." Indeed, the collective sum of damages demanded by Impac's subservicers is, by my estimation, substantially more than the total annual premiums paid by all U.S. residential appraisers for professional liability coverage. Impac's mass litigation and the potential for similar future efforts are problems that the valuation profession will have to cope with or eradicate. It is up to appraisers to combat this trend through legislative action and by declining to work for lenders that engage in this kind of litigation, or charging them fees sufficient to cover the increased liability risk. ◄

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