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GATHERING STORM

A torrent of litigation provides key lessons about appraiser E&O



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A flood of appraisal lawsuits has inundated Florida, wreaking havoc for appraisers dragged into the storm and revealing how many appraisers don't have the right E&O insurance coverage in place when the clouds burst.

The storm developed because investors purchased from lenders the right to sue appraisers over foreclosed mortgages. Most of the appraisals in these lawsuits, which continue to be filed as we go to print, were for mortgages held by Impac Funding Corporation, a subsidiary of a large mortgage company. For each foreclosed loan, Impac allegedly has signed a "Common Interest and Assignment Agreement" granting the investors "Any and all of its rights to pursue any and all claims (in contract or in tort) against the real estate appraiser(s) and/or the appraisal company."

In just two months, Llano Financing Group, the investor entity filing most of the lawsuits, has sued more than 175 appraisers and appraisal firms in Florida, and the hurricane of destruction is starting to hit other states. I will put the frivolity of the claims aside for the purpose of this article, but nevertheless, it's hard to ignore the fact that the lawsuit complaints use identical, generic language to describe the purported negligence of the defendant appraisers, regardless of the actual facts or the quality of the specific appraisals under attack. Let's hope that Impac decides to stop selling claims to litigation investors — the firm might make that decision once it discovers its own lending practices will be as much on trial as the alleged mistakes made by appraisers.

Complete Coverage

In the meantime, appraisers can learn two important lessons about having the right E&O coverage to protect them from a gathering storm:

1 "Individual-Only" E&O Policy Problems. Many of the appraisals being targeted by Impac lawsuits were performed by trainee appraisers working under the supervision of certified residential or certified general appraisers. In more than a dozen cases, the trainees are long gone and are not named as defendants, but the appraisers who signed the reports as supervisors are defendants, as are their appraisal firms. Coverage for some of these claims against the supervising appraisers has been denied by insurers because the appraisers had individual-only E&O. (This type of limited coverage is not sold in the Appraisal Institute's endorsed E&O program.) Individual-only policies are popular because they can be quick to get and often are less expensive than policies providing full coverage. However, most individual-only policies usually carry two large limitations — they exclude coverage for the insured appraiser when they are sued over work performed by another appraiser and they exclude claims related to appraisals where an insured appraiser signed as a supervisor. If you have ever had an employee appraiser, signed reports as a supervisor or subcontracted any work, this type of insurance policy may not



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The appraiser's current policy is going to provide coverage for appraisals as far back as the "prior acts" or "retroactive" date of that policy, and that date, in most cases, should go as far back as the appraiser and/or firm has maintained E&O insurance without lapse.

provide you the necessary coverage.

We often hear from the owners of appraisal firms who say something along the lines of, "I don't need a policy that covers me or my firm for claims over work performed by other appraisers because I've always required my appraisers to have their own insurance." However, you can't count on a policy carried by your appraiser trainees or employees to cover you because you're probably not named as an "additional insured" on their policies, and even if you are, there's no practical way to ensure they keep that coverage in place years down the road to cover a future claim filed against you. Also, if you employ appraisers and one of your employees is sued for an allegedly negligent appraisal, most state laws consider you, as the employer, to have a legal obligation to pay for their defense and any damages for which they are liable. If you have individual-only coverage, that burden will fall on you.

2 Understand "Prior Acts" and "Claims-Made." Many appraisers, firms and appraisal management companies don't understand that E&O insurance for appraisers (and almost all other professions)

is "claims-made" coverage. What that means is, the insurance policy that will cover the claim is not the policy that an appraiser had in place on the date of the appraisal but rather the current policy that an appraiser has in place at the time the lawsuit is filed or the claim asserted. Very importantly, the appraiser's current policy is going to provide coverage for appraisals as far back as the "prior acts" or "retroactive" date of that policy, and that date, in most cases, should go as far back as the appraiser and/or firm has maintained E&O insurance without lapse.

Many appraisals targeted by the flood of lawsuits hitting Florida relate to appraisals performed in 2005 and 2006, and unfortunately, a few appraisers have learned their policies don't cover work dating back to those years because they either allowed their coverage to lapse at some point or they purchased a policy that did not include prior acts coverage even if they were eligible, as sometimes occurs when an appraiser fills out an application for individual-only coverage without understanding prior acts coverage. Other appraisers are finding they have no coverage because they left the valuation profession or allowed their policies to expire without

purchasing "tail coverage," which would have extended the time for reporting claims on their last policy. The lessons: Remember the importance of preserving coverage for prior acts when making any kind of change to your coverage. If you are eligible for prior acts coverage, make sure your insurance policy provides coverage for the appropriate years. And, if you are leaving the valuation profession, discuss "tail coverage" with your broker — the insurance may be free under your policy when you retire.

Looking Ahead

Appraisers dragged into the Florida storm as defendants in the lawsuits — regardless of their E&O situations — need to take the situation seriously, obtain legal counsel and start mounting a legal defense. The claims can be successfully defended, and for the long-term, all appraisers should carefully weigh their decision to work for lenders that sell alleged claims against them. ▲



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