Lessons learned

Whatever happened with those three big appraisal liability cases?

by Peter T. Christensen

Six years ago, in this column, I wrote about three significant appraisal liability cases that were pending in the courts ("Full Court Pressure," Q4 2011; http://bit.ly/2pxrB0e). Not only were they newsworthy, they were also harbingers of potential legal issues for the valuation profession.

Let's catch up on those three cases and see what happened and what was learned.

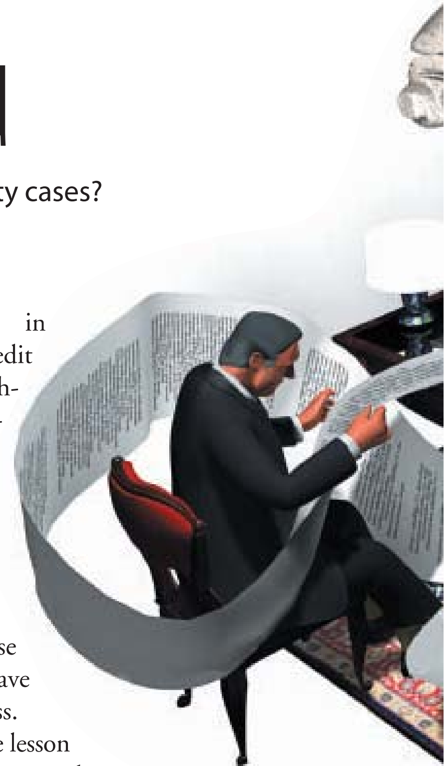
Gibson v. Credit Suisse et al., U.S. District Court (Idaho 2010)

This case was filed by a group of generally wealthy individuals who purchased lots or homes in four luxury resorts built by developers to whom Credit Suisse loaned hundreds of millions of dollars. The plaintiffs alleged the lender engaged in a "loan-to-own" scheme. Basically, they claimed Credit Suisse loaned without restriction such enormous sums of money that the developers were doomed to default and lose the developments put up as collateral, thereby harming people who purchased individual properties in the unfinished resorts. The plaintiffs also sued Cushman & Wakefield, in its appraisal capacity, and alleged that its appraisers had either negligently or otherwise provided inflated appraisals that enabled the loan-to-own scheme.

The case was — in terms of the $24 billion in monetary damages initially demanded — the largest appraisal liability case ever. In 2011, I wrote that it was at the far end of legal frivolity because of the complete disconnection between any of the plaintiffs (or their proposed class members) and the intended uses and users of the appraisal work.

What happened?

The case dragged on for years. The Idaho federal district court finally denied the plaintiffs' attempt to create a class action, and last year granted summary judgment in favor of both Credit Suisse and Cushman & Wakefield. But it took six years and millions of dollars to get there, and incredibly, the case isn't formally over because the plaintiffs have appealed their loss.



An unfortunate lesson learned in this case is that appraisal negligence litigation generally lasts far longer and costs significantly more than defendant appraisers anticipate. However, there's a good lesson to learn about why the appraisers won. The judge read the appraisal reports at issue and clued into language that stated the purpose of the appraisal was "to assist in internal decision making purposes regarding potential financing" and was "intended for use only by the client [Credit Suisse]."

Without meaningful evidence contradicting those points, the judge ruled, "Plaintiffs have not presented any authority or argument showing Defendants owed a duty to Plaintiffs to use reasonable care in conducting the appraisals. For these reasons, the court finds neither FIRREA nor USPAP imposed a duty of care on Defendants in favor of Plaintiffs."

Accordingly, appraisers' words describing the intended use and users of their appraisals do matter. Do a good job, and you might prevent liability to third parties you never expected would sue. Although the words used in the reports at issue in the Credit Suisse litigation ultimately were successful, in my opinion they were meager given the complex nature of

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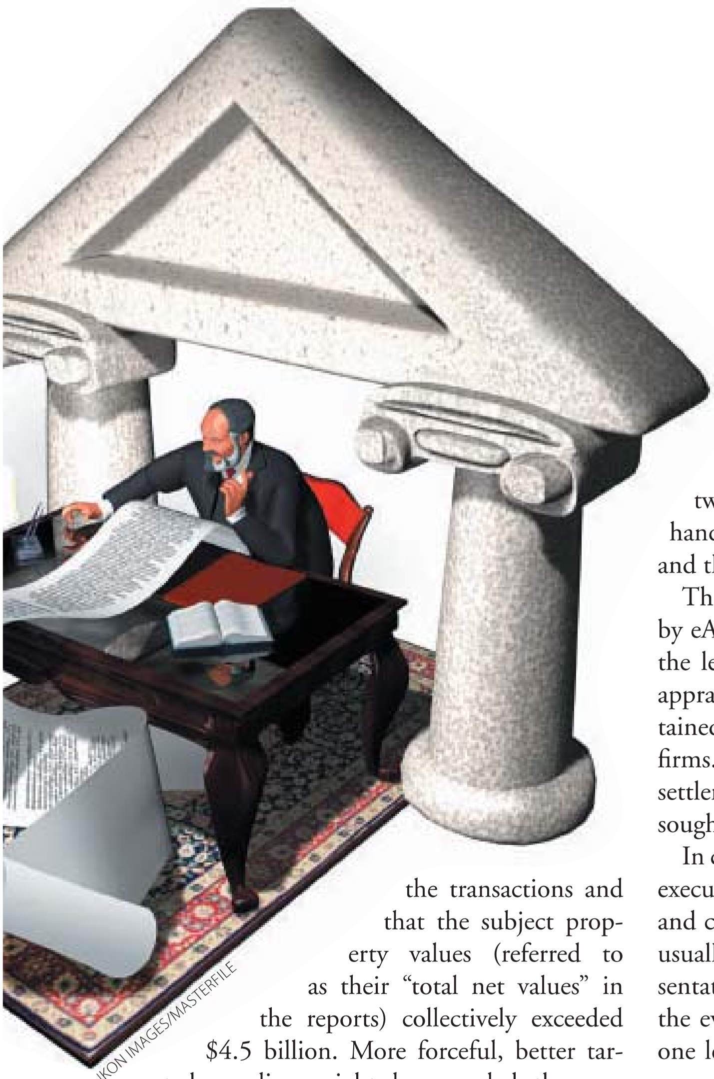

the transactions and that the subject property values (referred to as their "total net values" in the reports) collectively exceeded $4.5 billion. More forceful, better targeted wording might have ended the case sooner and saved millions in attorneys' fees.

FDIC v. eAppraiseIT and FDIC v. LSI Appraisal, U.S. District Court (C.D. Cal. 2011)

These two cases were filed by the Federal Deposit Insurance Corp. against appraisal management companies eAppraiseIT and LSI Appraisal. They were the FDIC's biggest appraisal liability cases arising from the mortgage crisis. Approximately 200 residential appraisals were involved in each case at the time of filing, and the FDIC demanded more than $100 million in damages against each AMC.

What happened?

In my 2011 article, I wrote that the cases would test "whether an AMC can be found directly liable for faulty appraisal work by their independent contractor appraisers." Well, the cases never went far enough to be meaningful tests because they settled in 2014. ServiceLink (LSI's successor) agreed to pay $30 million in compensation to the FDIC, while CoreLogic (eAppraiseIT's successor) settled for $12 million. Compared with the FDIC's initial damage demands, the settlements were draws.

The biggest lesson I see from these two cases primarily affects large firms that handle high-volume work for single clients — and that lesson is to shape up your contracts!

The contracts written for the work performed by eAppraiseIT and LSI Appraisal were among the lengthiest and most detailed contracts for appraisal services ever negotiated, and they contained substantial protections for the defendant firms. That is largely why the damages paid in settlement were dramatically less than what was sought by the FDIC.

In contrast, the contracts I currently see being executed by many firms are much less protective and could expose firms to potential liability — usually because of one-sided warranties, representations and indemnification provisions. In the event of another financial downturn (even one less severe than the most recent), I expect many of today's firms will be in a much worse legal position.

O'Brien v. Quicken Loans Inc. et al., Circuit Court of Ohio County, WV (2009)

Nearly six years ago, I wrote, "this case [was] tiny in comparison to the others." It was about a single residential loan, after all. Little did I know the unexpected path this case would follow and the future litigation it would help create — and the legal journey is not over.

What happened?

In a related case, liability for certain legal violations has been determined against Quicken and its affiliated appraisal management company, and a trial on the issue of the amount to be awarded to a statewide class of borrowers is weeks away (at the time of this writing). Will all appraisal fees charged to borrowers have to be refunded? Will other damages or penalties be awarded? You might read about this case in the news, but the real story will be told here in a future issue. ◄

About the Author

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