Take a seat

Appraisers shouldn't let liability fears prevent them from sitting in an arbitrator's chair

by Peter T. Christensen

As real estate appraisers seek to expand their services beyond traditional work for lenders, one field they should consider if they haven't already done so is alternative dispute resolution, which involves the resolution of disputes between parties outside of civil court in either arbitration or mediation. When a dispute concerns real estate interests, experienced appraisers are well-positioned to offer their expertise not only as valuation experts but also as decision makers in the role of arbitrator.

The arbitrator's chair may be unfamiliar to many appraisers, and given the frequent discussions about liability risk in traditional appraisal work, it's understandable that appraisers might have heightened concerns about liability as an arbitrator. It makes intuitive sense: As an arbitrator, you're dealing with parties already involved in a dispute, with lawyers and an atmosphere in which people are upset, and the loser is likely to become even more upset when you — the arbitrator — make your ruling. It's rational to wonder, if they're angry about my arbitration decision and think it's wrong, won't they sue me?

Quite simply, legally you are safer sitting in an arbitrator's chair than in an appraiser's chair.

I say that bluntly because I want to put to rest any concern about liability and encourage appraisers to take the arbitrator's chair more freely and frequently. The field presents good opportunities for appraisers, whether in arbitration related to commercial lease resets (a common arbitration role for appraisers) or to real estate partnership problems, divorce valuations or determinations of insurance loss claims.

Allow me to illustrate my point about liability with this story from the arbitration world.

We scratched our legal heads last summer when a "prestigious," high-powered big-city law firm sued an appraiser over the outcome of a rent reset arbitration. The law firm represented the owner of an office building located on leased land in a prime commercial area. When the rent came up for adjustment to current market conditions in 2016, the building owner and the landowner could not agree on the land rent, and commenced an arbitration process as specified in their lease. Like many such lease provisions, the protocol required each side to appoint its own appraiser-arbitrator, and those two appointed appraisers would select a third appraiser to serve as the umpire. The lease had not been adjusted in many years, so the valuation was a wide-open question.

At the arbitration, the building owner's appraiser-arbitrator presented an $18 million land valuation, while the landowner's appraiser-arbitrator proffered $50 million. The appraiser-arbitrator in the middle decided on a $40 million valuation, which formed the foundation of the arbitration award.

Stuck with that outcome, the building owner rushed to court, suing (among several other parties) the appraiser-arbitrator who served in the middle. Through its high-powered lawyers, the building owner made a variety of scary legal claims like "breach of the covenant of good faith and fair dealing," and made a demand for "millions of dollars in losses derived from this defective appraisal award" plus punitive damages. It sounded like the whining of a very sore loser.

Having previously witnessed this type of situation, my colleagues and I wondered how many days it would take for the lawsuit to be dismissed. How could we be so sure that the building owner had made a colossal error in suing the appraiser-arbitrator in a rent reset arbitration?

We knew because of something called "arbitral immunity," which is a protection afforded to arbitrators under both federal common law

About the Author

Peter T. Christensen is LIA Administrators & Insurance Services' general counsel. LIA manages the Appraisal Institute's endorsed E&O program for appraisers.

IKON IMAGES/MASTERFILE

(the legal precedent created by appellate court opinions) and under the statutory or common law of most every state that has considered the topic. It protects arbitrators from being sued by parties to the arbitration or by other participants when the party doesn't like the result or some other aspect of the decision-making. Although a lawsuit was filed in this case, most attorneys generally are aware of this type of immunity, which should prevent claims from being filed. When such claims are filed by those less informed, it usually results in swift dismissal of the claim at an early stage in the case, such as on a motion to dismiss.

While the legal details vary by state, arbitral immunity is such a powerful protection that I would advise hesitant appraisers to seriously pursue opportunities to sit in an arbitrator's chair.

So, how long did it take before the lawsuit against the appraiser-arbitrator was dismissed? About 90 days after filing the complaint, the building owner and attorneys agreed to dismiss their claims against the appraiser-arbitrator — after being schooled on the legal principles, and perhaps after realizing they were headed toward another losing outcome. ◄

While the legal details vary by state, arbitral immunity is such a powerful protection that I would advise hesitant appraisers to seriously pursue opportunities to sit in an arbitrator's chair.