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**Legal Doom**

By Phil Spool, ASA

When a lawyer writes you a demand letter, it usually ends with the words “govern yourself accordingly.” A demand letter from a lawyer or law firm, on behalf of a client, typically demands payment or some other action. If the demands are not met, the next step is in court of law in the form of legal action. “Govern yourself accordingly” means take caution as to what you do. These are good words of wisdom to remember when preparing an appraisal report.

For many years I have stated to my continuing education students at Miami Dade College that they should write their appraisal reports as if they are going to be sued or have a complaint filed against them. I now include the statement that they should also write their appraisal report as if it is being reviewed by a review appraiser for their client, especially for a bank or Appraisal Management Company (AMC).

**Lawsuits**
Lawsuits are filed by a plaintiff who typically is suing over a mistake which they feel resulted in a wrong conclusion of value. Even if you have taken precautionary measures to reduce your chances of being sued, there can always be a reason to sue you. Just because you believe your value is correct, doesn’t mean that you are protected from being sued. You can be sued by the buyer/borrower if you appraised the property for less than the contract price and additional money now has to be put up for the down payment. The seller might sue if the real estate transaction falls through because, as agents are so fond of saying, “the property did not appraise.” If the sale falls though who is always the first to get blamed? The appraiser of course.

Most appraisers believe the only entities (person or GSE) who have the right to sue are the Intended Users of their appraisal report. This is not necessarily so. This happens often in a bitter divorce (dissolution of marriage) battle. Someone might end up feeling shafted by a higher than expected value and wants to take it out on the person who caused them to come up with more money to pay their soon-to-be ex-spouse. Many believe having errors and omissions (E&O) insurance puts a target on their back. After all, for a plaintiff seeking to be “made whole” financially, what better way is there than to sue?

What to Do with a Claim
The first thing to do when a claim arrives is to take a deep breath and concentrate on the particular appraisal that the complaint is about. Don’t ignore the letter you receive, including the envelope it came in. Create a folder for this particular appraisal and put in everything related to this potential lawsuit, including correspondence. Next, notify your E&O insurance agent. They will guide you through the next steps. Do not even think about not notifying them.

You will be put in touch with an attorney hired by your insurance company, if you are smart enough to have coverage. The attorney will give you explicit instructions what to do, which most likely include providing him or her with a clear, clean copy of your appraisal report and workfile. This is a good opportunity to inquire about obtaining an expert witness to represent you. The expert witness is crucial to you as most attorneys are not knowledgeable about USPAP and Fannie Mae guidelines. Press the issue. Find out if your policy covers the expert witness fee. If not, then think about hiring your own. It might be well worth it (OREP offers free consulting with a USPAP expert to insureds). The expert witness you hire should be very well versed with courtroom and deposition testimony. An AQB (Appraisal Qualifications Board) Certified USPAP instructor is a plus.

I certainly hope you have a good, defensible workfile. For a refresher on what should be in your workfile, search for the story “What’s in Your Workfile” at WorkingRE.com (Volume 25, Fall 2010).

**State Board Complaints**
A state board complaint can start off as a value issue or disagreement over your comp selection and/or adjustments you made. Who usually files a complaint? Most complaints originate from an Intended User of the report and then filters down to a disgruntled party to a transaction or, in a divorce case, the other spouse who does not like your value. Most complainants are not after money, they usually file a complaint when they think the error(s) are egregious. A few are after revenge and want to see you have your license revoked.

Lenders and AMCs also file complaints, as they are now mandated to report USPAP errors. In most cases, they either get a second appraisal performed or, as part of their routine procedure, hire an appraiser just like you and me to perform a review. What about review appraisers? Some review appraisers have very narrow opinions about the “right way” to perform an appraisal, but very few seem to find unnecessary fault with appraisal reports merely to justify their existence. The problem arises when there is no consistency between reviewers working for the same lender or AMC. One reviewer wants one thing while another wants something else. What is most important is whether the lender or AMC files a complaint without giving you the chance to clarify, explain and/or correct. This is becoming more commonplace. We all tend to make mistakes or think we explained something clearly, when evidently we did not. The appraiser needs to have that chance to make corrections. To be charged with a complaint based on a report that was not allowed to be revised is dead wrong!

For the most part, you cannot control who files a complaint. What’s most important is what happens after the complaint is filed. Usually, you are contacted by your state regulatory agency and notified a complaint has been filed. Sometimes they give you a copy of the complaint before they have their state investigator contact you. At that point, it is too late for you to correct any mistakes or further explain your report. You are now considered “guilty” and have to prove you are innocent of the complaint. Now your entire appraisal report will be scrutinized and so will your workfile, which is supposed to support the facts and opinions stated in your report. The investigator in many cases will go beyond the complaint and examine your entire report and workfile under a microscope for any violations.

**Dos and Don'ts**
Are you like so many appraisers who just quote definitions or use boilerplate statements in their appraisal report? Have you become too complacent believing that no one will ever look at your workfile? This may be true until a complaint is filed against you. When one is, these questions will be important. Where are your field notes about your comparable sales? Did you ever write notes when you looked at the comparable sales? What about proof of your site (land) value? Where is your backup data to support your site (land) value? The same for the Replacement Cost New to Build. Don’t just cite Marshall & Swift “current,” assuming that is all that is needed. Print out the land sales or land extraction calculations and the Marshall & Swift cost calculations for the replacement cost new in the cost approach.

What data are you gathering? Are you calling agents on the comparable sales you are using? Are you asking the right questions? Most of all, are you writing down your conversations with the agents or other parties to the transaction? If you are speaking to an agent about one of your comparables, are you noting it? You should be. What are you writing down when you are looking at one of your comps? Write what you see. Is what you see different than the MLS photos taken by the agent? Does the house appear to have been renovated after it sold (look at the photos in the MLS)? Write down your observations. Have a copy of the MLS photos attached to the MLS data sheet, whether you print it in black & white or in color. MLS data sheets are often filled with mistakes. For example, it might say that the comp has a one-car garage when it actually is a two-car garage. Make a notation on your MLS data sheet that will go into your workfile. Also, mention in your appraisal report that the comparable has a two-car garage even though the MLS data sheet states something different. If something is different from what you see, note it.

Get that workfile in order. Have that workfile looking like you actually did look at the data you pulled. Again, this includes the notes taken about your sales. How can you convince the reader of your workfile (who is usually an investigator for the state regulatory agency) that you actually looked at your comps or supported your land (site) value or replacement cost new? It all should be in your workfile. If not, then it can be an easy win for the state appraisal board as you have no proof of doing anything but entering information on the appraisal from sheets of paper with no analysis performed. Remember, USPAP states that all data, information and documentation to support the appraiser’s opinions and conclusions must be included in your workfile or reference to the locations(s) of such documentation. If your workfile does not have the support (sales, land sales or land extraction analysis and replacement cost new from Marshall & Swift or other means, including local contractors information), your workfile should state where the support is located.

**Before Complaint Is Filed**
Get familiar with your state appraisal board and how a complaint is handled, from beginning to end as soon as possible. Find out the names of attorneys that represent appraisers that appear in front of the board and see if they hire appraiser expert witnesses. Find out how the process works. The appraiser expert witness you choose to help you does not have to be an AQB Certified USPAP instructor but it is a bonus.

**Note on AMC Appraising**
Most residential appraisers appraise for lending institutions via an AMC. If this is your situation, then you have three “requirements” to follow: (1) USPAP, particularly the Preamble and Standards Rule 1 and 2; (2) Fannie Mae guidelines, and (3) the lender or AMC requirements. The state appraisal board is mostly interested in USPAP violations but the AMC or lender will file a complaint based on any or all of these three. Following the strict requirements of a lender or AMC might result in a wrong value and therefore, a potential lawsuit and/or a complaint. The lender or AMC might restrict the appraiser into using only sales within the subject neighborhood and within three–six months. This limits comparable sales that could be more similar to the subject, especially if the subject is in a good substitute neighborhood or if the sale is older than six months but is more similar to the subject than more recent sales. Consider using additional sales that support your value but which are outside of the lender’s restrictions, in addition to those within the lender’s guidelines. If the sales support a lower or higher value based on comparables that you truly believe are better than the ones you’re restricted to using by your lender, use them and give them a greater weighted average for your concluded market value. Remember, your value is exactly that, your opinion of value, not the lender’s or AMC’s opinion of value.

**Summary**
No matter how good you think your appraisal report is, there always is a possibility of being sued or having a complaint filed. While it may never happen, it is always good to have a plan of action just in case. If you have E&O insurance, sleep easy. The first thing to do is to contact your insurance company to see if you can request the attorney of your choice, if you have one. Keep a cool head and make sure you have a good support group. Remember, a lawsuit is usually a result of the plaintiff not being satisfied with your value and not interested so much in your violations of USPAP, Fannie Mae or lender/AMC requirements. On the other hand, a complaint is usually a result of a violation of USPAP, Fannie Mae or the lender/AMC requirements. The complainant can be one of many persons or entities, whether it is an Intended User or not. Sometimes, a complaint is a result of the plaintiff in a lawsuit or the attorney representing the plaintiff filing the complaint. Your appraiser license is now in jeopardy and the outcome may result in a suspension or revocation.

In conclusion, while many lawsuits often turn into complaints eventually, it is important to note that while lawsuits are bad, a complaint can be much more damaging. A lawsuit, for the most part, is about money. A complaint, on the other hand, can hinder or prevent an appraiser from making a living due to a tarnished reputation or can result in the suspension or revocation of the appraiser’s license.

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**About the Author**
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