

Legal and Risk Issues Stemming from the Coronavirus Crisis

Tony Reese, Flagstar Bank

Peter Christensen, Christensen Law Firm



Tony is the Chief Residential Appraiser for Flagstar Bank located in Troy, Michigan. In his role Tony is responsible for oversight of the residential valuations prepared for the Flagstar Retail and Wholesale Divisions and the Flagstar vendor network.

Tony has a diverse background and has held positions in the past as a Chief Appraiser of a bank, an AMC, and a mortgage company. He spent more than half of his career as a field appraiser, where he specialized in appraisal of unique properties and as an expert witness, and has also spent time as a Compliance Officer at a default mortgage servicer.

Tony holds an SRA designation with the Appraisal Institute and has served as a Regional Representative for the Great Lakes Chapter. He has also served on the Board of the Michigan Mortgage Lender's Association and the Real Estate Roundtable for the Detroit Branch of the Federal Reserve Bank of Chicago.

Tony is a graduate of Wayne State University in Detroit, Michigan.



Peter Christensen is an attorney. His law practice is focused on providing legal counsel for matters concerning real estate valuation services and insurance coverage. He's the author of Risk Management for Real Estate Appraisers and Appraisal Firms published by the Appraisal Institute. His clients include appraisers, appraisal firms and management companies, as well as investors and technology companies. Prior to forming the Christensen Law Firm (www.valuationlegal.com), Peter worked with the national law firms of Latham & Watkins LLP and Irell & Manella LLP. For 14 years, he then served as the general counsel of LIA Administrators & Insurance Services, which provides liability insurance to thousands of appraisers, appraisal firms and right-of-way service providers. He continues to provide risk management education on behalf of LIA. Peter earned both his BS and JD at the University of California at Berkeley.

The moral issue with putting the appraiser in the field

- It's the appraiser's choice.....right?
- How does the appraiser view this decision and what factors come into play?
 - Loss of income
 - Losing ground to their competitors

What solution I felt was in the best interest of the bank and the appraiser

- Appraisers do have a choice, but in order to make that choice they need transparency
 - There are no consequences for declining orders
 - You will not be removed from the panel
 - You will not miss out on future opportunities
 - There will be alternative desktop and exterior opportunities
- How has it gone?

Preparing and Identifying our Largest Risks

- Initial planning started the beginning of March
- Transitioned entire company to WFH on 3/13
- Daily briefing from Executives and then breakout into BU related focus groups
 - Identify risks
 - Where is our exposure
 - Areas of weakness in the event of a recession
- Identify risk averse products and establish a plan to move forward

OCC

- Clear and concise message
 - Follow safety and soundness guidance
 - Adhere to Agency recommendations

Agencies

- Published temporary flexibilities for appraisal process
 - Held multiple meetings to clarify and educate the lenders and AMCs

Wholesale

- Correspondent
 - Originate and close in their own name
 - Adhere to Agency guidelines
- Broker
 - 3/25- provided our AMCs instructions on temporary procedural changes for broker placed orders

Retail

- Retail orders are managed internally
 - 3/25- delivered instructions to our employees on the temporary procedural changes that mimicked the communication to the brokers

- HELOC Valuation Products
 - Operate off a waterfall
 - Loan amount
 - LTV
 - Complexity
 - Lowest tier is model based valuation paired with a property inspection
 - Impact of crisis on model values and accuracy
 - Highest tier is an interior/exterior appraisal
 - Is it possible to still maintain safety and soundness with alternatives to interior/exterior appraisals

- Chaos!!!
 - Interpretation of the FNMA Lender Letter by loan officers, brokers, and appraisers was limited to the following nine words: “Exterior-only inspection appraisal: allowing for purchase and refinance”
- A blessing in disguise
- First wave of appraisal deliveries.....and appraisal issues
 - Appraisers conditioning interior/exterior appraisals “subject to”
 - Exterior inspection on 1004
 - Appraisers determining what form and level of inspection is appropriate on their own
- Manual procedural changes
 - Tag appraisers in the system still doing interior inspections
 - Orders accepted conditionally

Unexpected Consequences

- Increased stress levels and burnout of staff and vendors
 - Added hours
 - Increased stress
 - Unrealistic expectations
 - Inappropriate behavior and demands

- Further regulatory changes or guidance
- Liquidity in the market if this last more than eight weeks
- Market trends- their impact on values moving forward, and our vendors ability to identify the impact
 - Areas that I am monitoring locally where I have not been able to identify an impact yet include the following:
 - Median sales price was trending up through March
 - Closed sales volume was just beginning to flatten
 - DOM had yet to be impacted
 - Areas where I am already identifying a substantial impact on a local level between March of 2019 and March of 2020:
 - Pending sales down 21.4%
 - New listings added are down 19.8%
 - Number of showings per listing is down 26.6%

- The primary concern in this crisis, to date, is related to operational risk and compliance
- I feel comfortable from a regulatory standpoint and have few concerns about our residual risks
- Looking forward the largest concern is going to be the impact to housing and the economy. To mitigate this we need to do the following:
 - Work with our peer and partners to identify trends that alert us and our vendors to changing conditions as quickly as possible
 - Using these trends; test our products to identify impact and make changes accordingly



Thank You!

Tony Reese
Flagstar Bank
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- Discussion of potential liability concerns in relation to COVID-19 disease issues – that is, liability specifically for sickness issues.
- Potential economic liability issues – the more probable risk.
- Suggestions for decreasing liability risk.
- Insurance-related issues.
- Brief discussion of independent contractor classification (California AB 5) and its relevance to the COVID-19 crisis.

- One thing I am not going to discuss in detail today are the numerous and varying “stay at home” or “shelter in place” orders in states, counties and cities.
- There good resources for those on the Appraisal Institute’s website and a great deal of discussion of those has been occurring. And, increasing clarity is generally developing under the orders.
- Everyone should be familiar with the orders in areas in which they are managing or performing appraisals.
- Should determine whether real estate appraisal activities (for lending in particular) are permitted under the specific orders.
- But even where permitted, still should absolutely consider the necessity of certain activities – when alternatives exist.

- I'll start with the most frequent issue I am being asked about in regard to legal issues for appraisal work stemming from the COVID-19 crisis.
- The way it's asked usually depends on who is asking – whether that person is an appraiser or is affiliated with an AMC or a lender.
- Questions about this issue are really the hardest to answer – not just in a legal sense but also in terms of "what is right?"
- Here's an example – an appraiser performing residential appraisals in the Seattle, WA area emailed me this question on Friday.

“Many the lenders are still requiring interior inspections here, can the bank be held liable if I acquire the virus while doing an inspection and I die or one of my family members dies because I subsequently infected them?” - Seattle area appraiser

That’s a pretty stark question.

Another version of the question is:

“Can the bank or an AMC be liable to a borrower for sending an appraiser out, if a borrower later claims the appraiser sickened them?”

An appraiser recently reported to me that on her way inside a home for an interior inspection, the borrower threatened *“If you make me sick, I’ll sue you.”*

- I'm not a plaintiff's lawyer, but these claims are plausible if given good proof of compelling facts.
- The claim would likely be for some form of negligence.
- You've likely read about such lawsuits already – for example, a lawsuit was filed against Princess Cruise lines for gross negligence in allowing passengers to be exposed to COVID-19 on the Grand Princess that later docked in Oakland, CA. The lawsuit alleges that the cruise ship was allowed to go to sea knowing that two previous passengers had come down with symptoms of COVID-19. It further claims that the passengers were not warned of the potential exposure either before or after they boarded the ship.

- But in the context of home appraisals . . . the reality is that such claims would be difficult claims to prove. Most claimants would find it very difficult to establish that a given entity is specifically liable for infecting them. There is a vast array of community exposures through which the virus may have been contracted. (And other defenses would apply too.)
- Regardless, this frightening specter is definitely genuine reason to focus on decreasing or eliminating in-person inspections of occupied properties.

Peter Christensen – Legal and Liability Issues

- ✓ Indeed, here in California, the California Association of Realtors is concerned enough about similar liability issues that they've developed a special advisory form.
- ✓ Property visitors and service providers (such as appraisers) are being asked to sign the form.
- ✓ A similar form could very well be used by lenders or AMCs (but the simpler solution would seem to be to continue focusing on reducing interior inspections of occupied properties as much as possible or entirely until safer conditions exist).



CALIFORNIA
ASSOCIATION
OF REALTORS®

**CORONAVIRUS PROPERTY ENTRY
ADVISORY AND DECLARATION**
(C.A.R. Form PEAD, 4/20)

Property Address _____ Date _____

- RISKS OF EXPOSURE:** The Coronavirus (COVID-19) pandemic is a worldwide risk to human health. COVID-19 is highly contagious and has a mortality rate many times greater than the flu. COVID-19 can spread easily and exponentially. While people of all ages are at risk of catching COVID-19, persons especially at risk are those with compromised immune systems and the elderly. Persons over 65 of age may be at particular risk.
- "STAY HOME ORDERS":** In order to reduce the spread of COVID-19, the State of California, as well as many California cities and counties have issued "Safer at Home" or "Shelter in Place" orders, with exceptions for essential activities.
- REAL ESTATE SALES ACTIVITIES AS ESSENTIAL SERVICES:** Under Federal and State guidelines, activities required to facilitate a real estate transaction have been deemed essential activities. Nevertheless, designation of some real estate activities as essential activities does not make them free from COVID-19 risks. All persons must still practice "social distancing" and take all steps necessary to protect themselves and others. Finally, some county and city orders are more restrictive than Federal and State guidelines and may take precedence over Federal and State guidelines.
- REPRESENTATION AND AGREEMENT:** By signing below, you make the following representations and agree as follows:
 - You are either:
 - The seller, landlord, tenant, or occupant, voluntarily allowing someone to enter the Property for viewing, walk-through, inspections, or otherwise facilitating the real estate transaction; or
 - A prospective or actual buyer, tenant, real estate agent, or other person whose services facilitate the completion of a real estate transaction and are voluntarily entering the Property for the purpose of viewing, inspecting, or performing an activity or providing a services in furtherance of a real estate transaction.
 - You understand that showing and visiting properties may be dangerous or unsafe and could expose you or others to Coronavirus or COVID-19.
 - If applicable, you understand that your showing or visiting activities are part of an exception to Federal and State "Safer at Home" or "Shelter in Place" orders and that you are conducting those activities at your own risk.
 - You understand that if you engage in any activities in violation of the law, including Federal, State, county or city orders, you are acting against the advice of Broker.**
 - You agree to take all reasonable and necessary precautions to protect yourself and others from the spread of COVID-19, including, but not limited to the following:
 - You are aware of and agree to follow all Federal, State, and local laws and orders, including Stay Home, Safer at Home, Shelter in Place orders, even though such laws and orders may be changing rapidly.
 - You agree and understand that it is your responsibility to exercise care to protect yourself, such as assessing your own risks, which may include age, underlying health conditions, recent travel, possible exposure to COVID-19, doctor's recommendations, and State or Federal recommendations.
 - You represent that (i) to the best of your knowledge, you are not currently afflicted with, and have not knowingly, within the last 14 days, been in contact with someone afflicted with COVID-19, and (ii) you are not experiencing a fever, or signs of respiratory illness such as cough, shortness of breath or difficulty breathing, or other COVID-19 symptoms.
 - You believe that you are not likely to transmit or contract COVID-19.
 - When visiting or allowing someone to visit the Property, and if available, you agree to wash your hands with soap and water or use hand sanitizer, and to wear rubber gloves, a protective face mask, and protective shoe coverings. Remember to not touch your eyes, nose or mouth.
 - You agree to practice social distancing by keeping at least 6 feet between yourself and others. Do not gather in groups, and do not touch surfaces or items in the Property. If you believe it necessary to touch surfaces or items in the Property, consider the risks of doing so. You are reminded that wearing protective gloves, face masks, shoe coverings, and washing and sanitizing hand are steps you can take to protect yourself and others.
 - After showing the Property, sellers, landlords, and occupants should clean and disinfect the Property, paying attention to any areas that may be commonly touched, such as door knobs, handles and counter tops.
 - After viewing the Property, visitors should discard any gloves, masks or shoe coverings worn during the visit and wash their hands with soap and water for at least twenty seconds.
- AGREEMENT, DECLARATION AND ASSUMPTION OF RISK:** By signing below, you are declaring the foregoing is true, that you agree to take all recommended and reasonable actions to protect yourself and others from exposure to COVID-19, and that you assume the risk, as applicable, of entering the Property, or allowing someone to enter the Property. You understand and agree that no one, including but not limited to real estate brokers and agents, can guarantee that you will not be exposed to or contract COVID-19.

By signing below, I acknowledge that I have read, understand, voluntarily agree to the foregoing, and have received a copy of this Coronavirus Property Entry Advisory and Declaration.

(print name) _____ (signature) _____ Date _____

(print name) _____ (signature) _____ Date _____

If the person signing above is a real estate licensee, complete the following:

Brokerage Company name: _____ DRE License # _____

Salesperson or broker-associate name: _____ DRE License # _____

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EQUAL HOUSING
OPPORTUNITY

Legal and Liability Issues



CALIFORNIA
ASSOCIATION
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CORONAVIRUS PROPERTY ENTRY ADVISORY AND DECLARATION (C.A.R. Form PEAD, 4/20)

Property Address _____

Date _____

- RISKS OF EXPOSURE:** The Coronavirus (COVID-19) pandemic is a worldwide risk to human health. COVID-19 is highly contagious and has a mortality rate many times greater than the flu. COVID-19 can spread easily and exponentially. While people of all ages are at risk of catching COVID-19, persons especially at risk are those with compromised immune systems and the elderly. Persons over 65 of age may be at particular risk.
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- REPRESENTATION AND AGREEMENT:** By signing below, you make the following representations and agree as follows:
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 - The seller, landlord, tenant, or occupant, voluntarily allowing someone to enter the Property for viewing, walk-through, inspections, or otherwise facilitating the real estate transaction; or

4. REPRESENTATION AND AGREEMENT: By signing below, you make the following representations and agree as follows:

A. You are either:

- The seller, landlord, tenant, or occupant, voluntarily allowing someone to enter the Property for viewing, walk-through, inspections, or otherwise facilitating the real estate transaction; or
- A prospective or actual buyer, tenant, real estate agent, or other person whose services facilitate the completion of a real estate transaction and are voluntarily entering the Property for the purpose of viewing, inspecting, or performing an activity or providing a services in furtherance of a real estate transaction.

B. You understand that showing and visiting properties may be dangerous or unsafe and could expose you or others to Coronavirus or COVID-19.

C. If applicable, you understand that your showing or visiting activities are part of an exception to Federal and State "Safer at Home" or "Shelter in Place" orders and that you are conducting those activities at your own risk.

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Date _____

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What is the more likely legal risk?

Economic Fallout will Lead to the Liability Issues

- In key ways relating to liability and risk issues, the COVID-19 crisis is like a replay of the 2007-2009 financial crisis, but in *fast forward*.
- All at once, we have massive monetary losses, fears of wide scale unemployment (potentially greater than the financial crisis), and disruptions of lending.
- Black Knight addressed the potential effects on real estate markets and mortgages in an April 2, 2020 whitepaper:

Rising unemployment rates have already resulted in a surge of COVID-19-driven forbearance requests and associated operational challenges, and increased mortgage defaults are likely.

(Available on <https://www.blackknightinc.com>.)

Economic Fallout will Lead to the Liability Issues

- **There are certainly big differences in the fast government response, however, this time.**
- **And, mortgage lending has been far more restrained than occurred before the financial crisis – homeowners generally have more equity than they did then and better loan terms.**
- ***Nevertheless*, individuals and businesses are facing economic turmoil and we will likely see increased loan defaults and foreclosures in the future, and perhaps potential price declines.**
- **Per Black Knight, in the 2008 Great Recession, unemployment spiked at 10%, and mortgage delinquencies reached 10.6%.**
- **Here, a 20% unemployment rate (as discussed by Secretary Mnuchin) would, according to Black Knight’s modeling, **push the delinquency rate rate to 13.1%, with roughly 5 million homeowners becoming past due.****

The Liability Perspective Overview Relating to Appraisals

- If these financial conditions occur, the experience learned from the financial crisis in relation to appraisals (both residential and commercial) is that the conditions lead to substantially increased lawsuit claims in relation to appraisals against lenders, management companies and appraisers.
- ***Who really paid the liability price for appraisal liability in the last crisis? Not appraisers. It was originating lenders paid most of the price.***
- Such claims will come from two most common sources (50/50 was the experience in the last crisis): mortgage investors and borrowers.
- Some suits will be about appraisals pre-COVID-19; you have little control over those.
- There is control over appraisal work going forward.

Key Language in Reports Can Protect Appraisers and You

- **Some suggestions for simple, straightforward language for appraisers to include in their reports going forward.**
- **A short statement about COVID-19 and market conditions.**

This appraisal was performed following public awareness that COVID-19 was affecting residents in the United States. At the time of the appraisal, COVID-19 was beginning to have widespread health and economic impacts. The effects of COVID-19 on the real estate market in the area of the subject property were not yet measurable based on reliable data. The analyses and value opinion in this appraisal are based on the data available to the appraiser at the time of the assignment and apply only as of the effective date indicated. No analyses or opinions contained in this appraisal should be construed as predictions of future market conditions or value.

Of course, appraisers will need to adjust such language as market impacts begin to be observed and become measurable. It's the failure to observe and report on those impacts when they become measurable that could be the underpinning to future legal claims (as they were in connection with appraisals that failed to identify changing markets during the financial crisis 2007-2009).

Key Language in Reports Can Protect Appraisers and You

- **With the prospect of increased legal claims by financially strapped borrowers in the future, it's very important to reiterate that appraisals are for use by clients/intended users only.**

The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal and such parties should not rely on the appraisal for their own purposes. Receipt of a copy of the appraisal by such a party or any other third party does not mean that the party is an intended user of the appraisal. Such parties are advised to obtain an appraisal from an appraiser of their own choosing if they require an appraisal for their own use. This appraisal report should not serve as the basis for any property purchase decision or any appraisal contingency in a purchase agreement relating to the property.

Some aware lenders and AMCs already put notices stating a similar proposition in their cover letters/email transmissions of appraisal reports to borrowers.

Key Language in Reports Can Protect Appraisers and You

- **Encourage appraisers to use plain English in their reports when they are relying on photos taken by third-parties or information supplied by a third-party.**

Example: In performing this assignment, due to conditions stemming from COVID-19 and in accordance with guidance received from the lender-client, I did not make a personal inspection of the interior of the subject property. I have used photos and information from [describe the details]. For the purpose of this appraisal, the appraiser assumes the information supplied from these sources is accurate.

- **For purposes of liability reduction, must the appraiser use an Extraordinary Assumption? The instructions from the GSEs state that extraordinary assumptions should not be used for their alternative flexible appraisal approaches. Based on extensive claims experience, the reality is that this distinction in USPAP makes no discernable difference in real world lawsuit claims. The far more valuable protection is for the appraiser to explain in plain English what information from third parties they are relying on -- whether a "general" or "extraordinary" assumption is stated has not shown to be relevant in liability claims.**

Appraisal Management Service Agreement Issues (Service Level Agreements)

What are an AMC's duties to its lender clients with respect to continuing to fulfill appraisal orders in this very challenging environment?

- Depends on the contract with the lender. What does it say?
- Force majeure? What does that mean?
- Can also depend on state law to some extent.

Reviewed 20 plus large lender/AMC agreements on the issue - and found a fair number in which AMC could still be obligated to deliver appraisal orders, notwithstanding the extra difficulties and increased costs.

Appraisal Management Service Agreement Issues (Service Level Agreements)

Example Language from an AMC/Lender Contract

3.4 *Service Provider's Termination of Agreement for Cause.*

The Service Provider may terminate this Agreement or any Work Order effective immediately upon five (5) days prior written notice given by the Service Provider to [REDACTED] if [REDACTED] has breached material representation, condition, promise, covenant, term or warranty under this Agreement or has failed to perform any of its material obligations under this Agreement and [REDACTED] has not cured the failure, if a cure is possible, within thirty (30) days after [REDACTED] receives written notice of the failure from the Service Provider.

- (c) If Service Provider fails to meet its Service Levels, the Service Provider shall pay to [REDACTED] the Service Level Credits, if any, no later than the fifteenth (15th) Business Day after the Service Level Credits become payable.
- (d) Notwithstanding the foregoing, Service Provider expressly acknowledges and agrees that the payment of Service Level Credits, if any, is without prejudice to any right of [REDACTED] to terminate this Agreement or any Work Order, and, upon such termination to seek additional remedies available to [REDACTED] at law or in equity but subject to Service Provider's applicable limitation of liability provisions set out in Section 15 and elsewhere in this Agreement. Service Provider and [REDACTED] hereby acknowledge that the Service Level Credits are not a genuine pre-estimate of damages suffered by [REDACTED] as a result of missed Service Levels but represent a reduction in the fees payable by [REDACTED] because [REDACTED] did not receive the Services for which it contracted.

Appraisal Management Service Agreement Issues (Service Level Agreements)

Example Language from an AMC/Lender Contract

10.0 EVENTS OF FORCE MAJEURE

- 10.1 *Definition.* In the event that either Party shall be delayed or hindered in, or prevented from the performance of any act required hereunder (other than the payment of money) by reason of riots, insurrection, acts of terrorism, war, fire or other casualty, or other reason of a similar or dissimilar nature beyond the reasonable control of the Party whose performance is delayed (each a "Force Majeure Event"), then performance of such act shall be excused for the period of delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.
- 10.2 *Continuing Obligations.* No Party shall be relieved of its obligations hereunder if its failure of performance is due to removable or remediable cause which such Party fails to remove or remedy using commercially reasonable efforts within a commercially reasonable time period.

Frequent AMC Insurance Question

“Do we have coverage for our losses or liabilities stemming from COVID-19?”

“First party” – business losses. With respect to business losses, many AMCs have BOP or property insurance policies that include “business interruption” coverage. That sounds relevant . . .

but the coverage is almost always limited to situations when there has been a covered physical loss or damage associated with a covered property. (Think hurricane wipes out store, and store must close.) Most also have exclusions relevant to virus issues.

But stay tuned . . . Legislators and insurance commissioners are eyeing insurance coffers as a potential source to pay for business losses.

However, whether to submit a claim should still be discussed with your broker/legal counsel. Policies differ and relevant litigation about insurance coverage is already occurring.

ASSEMBLY, No. 3844
STATE OF NEW JERSEY
219th LEGISLATURE

INTRODUCED MARCH 16, 2020

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. a. Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic.

Frequent AMC Insurance Question

“Do we have coverage for our losses or liabilities stemming from COVID-19?”

Liability to other parties. General liability and professional liability policies are the policies that would cover third party claims. (The scenario where a borrower sues because the appraiser allegedly made the borrower sick.)

Unfortunately, coverage could be problematic here too. First, professional liability policies for services such as appraisal management generally do not cover bodily injury, disease, etc. (there are new exceptions for some appraiser-specific policies that include some coverage).

It’s the general liability policy that would likely be most relevant because it covers “bodily injuries” - but many have exclusions for communicable diseases...

But if such a legal matter occurs, definitely discuss the issue of insurance coverage with legal counsel - don’t assume coverage does not exist. Policies differ and relevant litigation about insurance coverage is already occurring.

Other Legal Impacts

California Assembly Bill 5 - California's law making it more difficult to classify workers/service providers as independent contractors.

Hoped for amendments of the law relevant to appraisers may be more difficult to obtain, due to the particular impact that COVID-19 is having on California's "gig workers."