Audio/video will begin at 9:30 a.m.
You can minimize the webinar screen by hitting your “esc” button

Free Webinar:
Legal and Risk Issues for Appraisers Stemming from the COVID-19 Crisis

Stay-at-home orders.
Language for appraisal reports.
Future liability concerns. Insurance matters.
Personal legal planning.

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Legal and Risk Issues for Appraisers Stemming from the COVID-19 Crisis

March 24, 2020
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Peter is an attorney and member of the California and Washington State Bars. He maintains a law practice focused on legal and regulatory issues concerning real estate valuation. His clients include appraisal firms, management companies and other providers and users of valuation services.

Where We Going This Morning?

- Discuss legal nature of appraisal work/business in light of current COVID-19 and “stay-at-home” orders.
- Discuss language ideas for appraisal reports responding to COVID-19 issues.
- Address my main concerns with respect to appraiser liability going forward.
- Convey important information about E&O insurance.
- End with two suggestions about personal legal planning.
- Aiming for 45-60 minutes.
Light Housekeeping

- I will be the only speaker today.
- Don’t worry I can’t turn your microphone on – unless you ask me to.
- The slides I am using today are available later under the “resources” tab on www.valuationlegal.com.
Q&A

More than 1,000 people signed up for the today’s webinar.

For that reason, Q&A is not feasible today because I would miss too many people’s important questions and answering only a few could mislead people about what is most important.

I hope attorneys in your local area are be open to fielding questions in a time such as this.
Can Lawyers Save Us from COVID-19?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BUZZ PHOTOS
2414 W University, Suite 115D
McKinney, Texas 75071

and

FREEDOM WATCH, Inc.
2020 Pennsylvania Avenue N.W. Suite 345
Washington, D.C. 20006

and

LARRY KLAYMAN, a Natural Person

and

Members of the Class and Subclasses and Those Situated

v.

THE PEOPLE’S REPUBLIC OF CHINA

and

THE PEOPLE’S LIBERATION ARMY,
The official military of China

No, but just in case you want to join a class action, there is one already on file.

In this class action complaint, lead Plaintiffs Buzz Photo, Freedom Watch, Inc., Larry Klayman putative plaintiffs as members of the class and subclasses and all persons and entities similarly situated (collectively “Plaintiffs”) sue Defendant the People’s Republic of China and the other Defendants as set forth herein, and show and allege as follows:

I. INTRODUCTION AND NATURE OF THE ACTION

1. This is a complaint for damages and equitable relief arising out of the creation and release, accidental or otherwise, of a variation of coronavirus known as COVID-19 by the
Trying to Put the Legal and Risk Issues Stemming from COVID-19 into Perspective

- In keys ways, the COVID-19 crisis is like a replay of the financial crisis in 2007-2009, but in fast forward.
- All at once, we have massive monetary losses, fears of wide scale unemployment (great than the financial crisis), and likely disruptions of lending.
- There are certainly big differences in the fast government response, however, this time.
- Individuals and businesses will face economic turmoil and we may see increased loan defaults and foreclosures in the future, as well as potential price declines.
- If these conditions occur, the experience learned from the financial crisis is that they lead to lawsuit claims against appraisers (and many other parties, of course).
- Some suits will be about appraisals pre-COVID-19; you have little control over those.
Bigger Liability Concerns

- Other claims will involve appraisals performed post-COVID-19.
- Post-COVID-19 may be similar to the appraisals performed in 2007-2008 when data began indicating that real estate markets were declining in price and condition.
- The toughest appraisals to defend in claims following the financial crisis were those in which the appraisers failed to identify the changed markets and declining prices (typically, by utilizing older comparable sales).
- Don’t let that be you as an appraiser. Stay on top of markets and data. Identify and report the changing markets to the extent that the effects are measurable.
Bigger Liability Concerns

- This is one of the messages of the Appraisal Institute’s standards guidance - *Guide Note 10 - Developing an Opinion of Market Value in the Aftermath of a Disaster*:

  The appraiser must be especially mindful of issues relating to the date of value. Ideally, comparable data must be selected from the same market area and must be subject to the same market conditions. Transactions that occurred prior to the disaster will not reflect the same market conditions as those occurring after.

  As we get further down the road, that will be key practice guidance to follow - guidance that decreases your legal risk.
Let’s Look at Some Real-World Current Legal Issues Concerning Appraisal Work in the COVID-19 Crisis

- Can you keep appraising in light of “stay-at-home” orders?
- A lot of focus on the inspection component. Can you inspect properties?
- This second question is quickly becoming less relevant because GSEs, individual lenders and regulators are beginning to act and change requirements.

- Before I get into some specifics, however, I want to make it clear that I am not promoting that appraisers actually head out in the field where any stay-at-home orders exist. I am home and, in areas of stay-home-orders, performing your work from home is probably the best option for you, your family and the public, especially when there are alternative ways to get the important lending work done.
- It’s certainly not “business as usual” while wearing gloves and masks (masks really should go to medical personnel).
- Those are my opinions.
Let’s Look at Some Real-World Current Legal Issues Concerning Appraisal Work in the COVID-19 Crisis

With that in mind, let’s look at the legal issues.

- My conclusion at this moment is that under most state orders, appraising for credit purposes does fall under the purposes behind the “critical infrastructure” workforce exceptions for the “financial sector” embodied in most state orders, including California’s. (Read your state’s or county’s order – some don’t follow the federal guidance.)
- There may be appraisal work that falls into other critical infrastructure sectors, but it’s tough for me to imagine what those assignments might be at this moment (for example, maybe there are tax assignments subject to government deadlines that have not been lifted? I’d hate to think so.).
- In reality, the descriptions of enforcement have not yet been applied punitively.
- And, common sense, should prevail. My attorney bar card and your appraisal license are not law enforcement badges. Follow local law enforcement directions.
ORDER OF THE STATE PUBLIC HEALTH OFFICER
March 19, 2020

To protect public health, I as State Public Health Officer and Director of the California Department of Public Health order all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.
The federal government has identified 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof. I order that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californians’ health and well-being.
Stay at Home Orders


FINANCIAL SERVICES SECTOR

The Financial Services Sector represents a vital component of our nation's critical infrastructure. Large-scale power outages, recent natural disasters, and an increase in the number and sophistication of cyberattacks demonstrate the wide range of potential risks facing the sector.

Sector Overview

The Financial Services Sector includes thousands of depository institutions, providers of investment products, insurance companies, other credit and financing organizations, and the providers of the critical financial utilities and services that support these functions. Financial institutions vary widely in size and presence, ranging from some of the world's largest global companies with thousands of employees and many billions of dollars in assets, to community banks and credit unions with a small number of employees serving individual communities. Whether an individual savings account, financial derivatives, credit extended to a large organization, or investments made to a foreign country, these products allow customers to:

1. Deposit funds and make payments to other parties
2. Provide credit and liquidity to customers
3. Invest funds for both long and short periods
4. Transfer financial risks between customers
March 22, 2020

MEMORANDUM FOR FINANCIAL SERVICES SECTOR

FROM: Secretary Steven T. Mnuchin

SUBJECT: Financial Services Sector Essential Critical Infrastructure Workers

The financial services sector is identified as Critical Infrastructure Sector by the Department of Homeland Security (DHS). The attached DHS guidance, dated, March 19, 2020, identifies the essential critical infrastructure workers during the COVID-19 response emergency, and provides guidance to State and local officials as they work to protect their communities while ensuring continuity of critical functions to public health and safety, as well as economic and national security.

Consistent with the President’s guidelines, “if you work in a critical infrastructure sector, as defined by the Department of Homeland Security, you have a special responsibility to maintain your normal work schedule.” The Essential Critical Infrastructure Workforce for the financial services sector includes workers who are needed to process and maintain systems for processing financial transactions and services, such as payment, clearing and settlement services, wholesale funding, insurance services, and capital markets activities; to provide consumer access to banking and lending services, including ATMs, movement of currency (e.g. armored cash carriers); support financial operations, such as those staffing data and security operations centers; and, key third party providers who deliver core services. These individuals are critical to maintaining safe and efficient financial services and ensuring citizens have access to these services that are necessary to conduct their daily lives.
Stay at Home Orders

Washington State
(Also ties to the 16 critical infrastructure sectors – but the spirit is more focused on health and safety and refers to “Essential Critical Infrastructure Workers”)

On March 23, 2020, Governor Inslee issued an Executive Order directing all residents immediately to heed current State public health directives to stay home, except as needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as the State Public Health Officer may designate as critical to protect health and well-being of all Washingtonians.

In accordance with this order, the Governor has designated the following list of “Essential Critical Infrastructure Workers” to help state, local, tribal, and industry partners as they work to protect communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.
FINANCIAL SERVICES

Sector Profile

The Financial Services Sector includes thousands of depository institutions, providers of investment products, insurance companies, other credit and financing organizations, and the providers of the critical financial utilities and services that support these functions. Financial institutions vary widely in size and presence, ranging from some of the world’s largest global companies with thousands of employees and many billions of dollars in assets, to community banks and credit unions with a small number of employees serving individual communities. Whether an individual savings account, financial derivatives, credit extended to a large organization, or investments made to a foreign country, these products allow customers to: Deposit funds and make payments to other parties; Provide credit and liquidity to customers; Invest funds for both long and short periods; Transfer financial risks between customers.

Essential Workforce

- Workers who are needed to process and maintain systems for processing financial transactions and services (e.g., payment, clearing, and settlement; wholesale funding; insurance services; and capital markets activities)
- Workers who are needed to provide consumer access to banking and lending services, including ATMs, and to move currency and payments (e.g., armored cash carriers)
- Workers who support financial operations, such as those staffing data and security operations centers
r. **Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services);
More Info on Stay at Home Orders and on Changing GSE Requirements


More Information

To learn more, feel free to read these documents:

Governors’ Stay at Home Orders, alphabetically by state (March 23, 2020)

Freddie Mac’s “Selling Guidance Related to COVID-19” (March 23, 2020)

Fannie Mae Lender Letter “Impact of COVID-19 on Appraisals” (March 23, 2020)

Appraisal Institute Seeks Guidance from Policy Makers (March 18, 2020)

Al Issues Coronavirus-related Direction for Appraisers (March 18, 2020)
Changing GSE Requirements

https://singlefamily.fanniemae.com/media/22321/display

Lender Letter (LL-2020-04)  

To: All Fannie Mae Single-Family Sellers  
Impact of COVID-19 on Appraisals  

During this COVID-19 national emergency, in many cases lenders are unable to obtain an appraisal based on a full interior and exterior inspection of the subject property. In response, we are allowing temporary flexibilities to our appraisal requirements. We are working closely with Freddie Mac under the guidance of FHFA to offer these temporary measures.

Temporary appraisal requirement flexibilities  

Effective immediately, we are allowing temporary flexibilities to our appraisal inspection and reporting requirements. As described below, we will accept an alternative to the traditional appraisal required under Selling Guide Chapter B4-1, Appraisal Requirements, when an interior inspection is not feasible because of COVID-19 concerns. We will allow either a desktop appraisal or an exterior-only inspection appraisal in lieu of the interior and exterior inspection appraisal (i.e., traditional appraisal).

If a traditional appraisal is not obtained and there is insufficient information about the property for an appraiser to be able to complete an appraisal assignment with a desktop or exterior-only inspection appraisal, the loan will not be eligible for delivery to us.
12. **Real Property Inspections.** How should financial institutions respond to COVID-19 related issues relative to inspections of real property?

Financial institutions should consult with appraisers and other persons performing real estate inspections about alternative arrangements if the property owner does not want to permit access to the interior of a property due to concerns related to COVID-19.

13. **Real Property Appraisals.** How should COVID-19 related issues be addressed in appraisal reports?

Financial institutions should consult with appraisers about how to address any short-term, temporary reduction in the income stream produced by income-producing real estate that has been affected by COVID-19.
The bottom line is that unless it’s “business as usual” in your state and county, then if it’s either not permitted in your area to leave home for appraising or if you feel it’s not appropriate or safe for you or the borrower (or other property point of contact), you should communicate with the lender, or the AMC as the lender’s agent, about the assignment.

The decision about whether an inspection is required (even for a GSE assignment) or about what specific appraisal report format to use, rests jointly with you and the lender.

It’s the lender who knows where the loan is going, what type of loan it is, and what their responsibilities are to mortgage investors. This information, along with the appraiser’s information about safety or other conditions in the field, are what is needed to determine what the acceptable appraisal options are. (In some cases, no appraisal may be the only option.)
Suggestions on Language for Reports

- 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 for appraisers who failed to identify changing markets during the financial crisis 2007-2009).

Appraisers cannot disclaim the virus and observable impacts away (doing that does not serve clients and can itself lead to claims).
Suggestions on Language for Reports

- If you preparing residential appraisals under the various new guidelines prepared by the GSEs and thus including their modified text, I think a mention of this fact in the report is probably warranted:

  The standard form used to report this appraisal includes and is subject to modified language prepared by Freddie Mac and Fannie Mae in response to the impacts of COVID-19. Any language in the standard form that has not been specifically modified by Freddie Mac and Fannie Mae’s changes should be read in context with their modifications and the adaptation of the standard form to report an appraisal that may have been performed differently than contemplated in the original form.
Suggestions on Language for Reports

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

The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal. 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.
Suggestions on Language for Reports

- If you are relying on photos taken by third-parties or information supplied by a borrower, then a plain English statement (and potentially an extraordinary assumption in a non-GSE assignment) about that would be appropriate. Examples:

  In performing this assignment, due to conditions stemming from COVID-19, I have used photos and information from [describe the details]. . . . This source of information may have an interest in the transaction or loan.

  Example: [Extraordinary Assumption – an interior inspection of the subject property was not made by the appraiser due to COVID-19 conditions. The appraiser’s personal inspection consisted of viewing the subject from the street frontage. Information on relevant physical characteristics has been obtained from sources specified in the appraisal’s scope of work. If the information obtained from these sources is incorrect, the assignment results of this appraisal could be affected.] (This based on a suggestion from MBREA.)

- Technology is in use already in certain hybrid products that combines photos/videos taken by borrowers or other property points of contacts with GPS and other means of verification. You will likely see these technologies in play quickly.
Be Mindful of Your E&O Insurance

- During the financial crisis, a significant number of appraisers left active fee appraising for staff employment, took a hiatus, or just quit.
- Others dropped their E&O to save a bit of money.
- Be careful with your E&O.
- Don't let your coverage lapse unintentionally.
- If you’re retiring, make sure to explore retirement tail coverage – which is often free.

Policy Period: From 11/28/2016 To 11/28/2017

Retroactive Date (if applicable): 11/28/1994
Will a “BOP” Policy Cover My Virus Losses?

Generally speaking, business owner’s policies (and similar coverage) may offer “business interruption” coverage 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.)

But stay tuned . . . Legislators and insurance commissioners are eyeing insurance coffers to pay.
Will a “BOP” Policy Cover My Virus Losses?

March 10, 2020

TO: All authorized Property/Casualty Insurers

RE: CALL FOR SPECIAL REPORT PURSUANT TO SECTION 308, NEW YORK INSURANCE LAW: BUSINESS INTERRUPTION AND RELATED COVERAGE WRITTEN IN NEW YORK
Will a “BOP” Policy Cover My Virus Losses?

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.
Personal Legal Planning

The crisis also raises awareness in general of needing to take other precautions and make personal legal decisions:

• Think about preparing a list of detailed information and instructions about various kinds of accounts (online, financial, etc.) in case you are personally incapacitated.
• Think and talk with family members, if you have not done so before, about personal medical directives (be sure to find information specific to your state).
Excellent Washington State Materials on Medical Directives

https://www.honoringchoicespnw.org

Many states have similar “Honoring Choices” non-profit sites. For California, I will have a link on my site to a template published by the California Hospital Association.
Thank You

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