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A lawsuit commercial appraisers might want to follow

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Appraisers are facing an E&O insurance crisis - to be more precise, Australian appraisers, or "valuers" as they are called there, are facing a crisis. They pay as much as 7-10% of their gross revenue for professional liability insurance. From here, it looks like their problem stems primarily from appraisals being treated as guaranties of value for lenders, mortgage insurers and borrowers. American appraisers are not facing that kind of crisis yet but they should pay attention to developments in our courts and here is one case worth watching.

Gibson, et al. v. Credit Suisse AG, et al., U.S. District Court (D. Idaho), filed January 3rd, 2010. This is the biggest appraiser liability case in the U.S. in terms of alleged damages ($24 billion). The lawsuit concerns loans by Credit Suisse and appraisals for those loans to the developers of four luxury projects in Idaho, Montana, Nevada and the Bahamas. The plaintiffs are not the appraisers' clients or anyone the appraisers might have imagined as users of their reports - they are an alleged class of approximately 3,000 individuals who purchased lots or homes in the resorts built by the developers to whom Credit Suisse lent money. The plaintiffs contend that the lender created a so-called "Loan-to-Own" scheme under which the lender, aided by inflated appraisals, lent hundreds of millions intending that the developers would default and that the lender would then foreclose and obtain ownership at below market value. The appraisals were supplied by the appraisal division of a national brokerage, which is named as a defendant. The plaintiffs allege that the appraisals, which used an unorthodox methodology referred to as "total net value," were either negligent or intentionally misleading.

The case provides several timely warnings for appraisers. First, it calls attention to the fact that the concepts of intended use and user do not protect appraisers from litigation by third parties as strongly as most appraisers would like to believe. The plaintiffs' case has so far survived two motions to dismiss, despite the fact that the plaintiffs were neither intended users nor even imaginable recipients of the appraisals. Commercial appraisers need to be very attentive to carefully limiting the use of and reliance on their reports, if they wish to avoid much of the litigation affecting their profession.

The case also highlights the danger of professional cannibalization. The appraisers at the defendant appraisal shop have discovered that their own colleagues are ready and willing to testify against them and advocate for their liability to parties whom the appraisers never imagined as intended users. Recall that the appraisals were for loans to the developers and that the lot and home owners were not parties to these loans - in fact, many purchased their properties before the loans were made. Yet, the plaintiffs' expert witness appraiser opines to such conclusions as: "In my opinion, the procurement and use of the appraisals was designed to artificially inflate values so as to defraud developers, and others who had, and would, purchase lots or homes or otherwise invest in the resorts." Professional attacks such as these assure that the relevance of intended use and user will

continue to erode for all appraisers, not just those on trial with Swiss bankers.

Finally, the sheer size of this case is impacting the profession by highlighting the risk that insurance carriers face with large commercial appraiser operations. That risk may also impact the sustainability of appraiser operations at national brokerages. While this case stands out because of the plaintiffs' headline grabbing - frankly, silly - demand for damages, the case is not a singular phenomenon.

Coincidentally, a later appraisal of one of the same properties in this case recently became the subject of litigation for the appraisal division of a different national brokerage. Smaller by comparison, that case concerns $200 million in alleged damages.

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