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Appraiser & agent liability and insurance update - by John Torvi

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At this time last year, real estate appraisers were concerned about the impact of hybrid appraisals, third party inspections and a dwindling supply of homes for sale, creating both practice and economic/income issues. The appraisal profession shrunk in part to low fees and diminishing opportunity. Questions pertaining to liability and insurance coverage were focused on hybrid and third-party inspection concerns. What would be the appraisers' liability if they signed off on hybrid inspections or those containing data collected virtually from third-party sources? Other emerging concerns included potential liabilities from inspecting cannabis-related properties due to existing federal prohibitions, drone use and bidding wars impacting property values and therefore valuation.

The good news is that malpractice claims against appraisers have remained at a lower level than during the 2008 crisis, when claims against appraisers went through the roof. Disciplinary actions remain at a consistent level to previous years, however. While appraisers had to make business decisions about performing hybrid appraisals, etc, most claims and board complaints were consistent with previous years – square footage discrepancies, zoning, comparison selections, property characteristics and defects, including un-permitted improvements and highest and best use. The impact of virtual or third-party data on appraisals is not well known at this time, though it is negatively impacting real estate agents in the form of increased disclosure/property defect claims.

Then came the pandemic. The big concern for appraisers and real estate agents was how to operate safely, protecting themselves and others from virus transmission, not incur additional liability and still make a living. Any silver lining from this is that society still needed to buy and sell real estate, creating work if one wanted it. The FHA offered a series of guidelines that aimed to ease certain practice requirements for both lenders and appraisers, but as these were developed primarily to benefit the general public, real estate professionals had to develop “on the ground” solutions to providing their services. MBREA and other professional appraisal and real estate associations assisted by offering practice tips and advice. The questions we received the most, as insurers, and most germane to this article is – what are my liabilities and am I covered?

A quick review of insurance policies most often carried by real estate professionals is helpful here. Errors and omissions (E&O) policies protect against allegations of (you guessed it) error or omission in providing a professional service, like those measurement, comp selections and so on mentioned above. Most policies will respond both to a legal demand for compensation (a claim) or a board complaint. They may not provide coverage for damage to property or injury to a third party (note all insurance policies are different, and one should be familiar with specific coverages of any policies they own). General Liability policies (CGL, Business Owners Packages) provide protection if bodily injury to another person or property damage results while providing a service. One can see that COVID-19 transmission risks span across both types of policies. While providing a professional service (E&O coverage), the appraiser/agent allegedly transmits, or allows the transmission, of the virus, impacting the use or value of a property. While providing the same service, the appraiser/agent allegedly contaminates or allows contamination of a property, resulting in damage to

the property or injury (illness) to another. What policy covers what?

In planning responses, the insurance industry anticipated a significant spike in claims related to the consequences of COVID-19 transmission. To this point, few if any COVID-19 transmission claims against real estate professionals have been noted. This could be due to the precautions and practice methods being put into place by appraisers and agents (though open houses and property showings remain problematic) and difficulty in determining exactly where and when a person became infected. Most COVID-related claims to date have to do with lost income and business interruption from business closures, and management liability alleging unsafe working conditions. The additional factor is that most if not all policies exclude damages due to virus, bacteria and contamination. These policy conditions were in place long before COVID-19, though numerous lawsuits are challenging these provisions.

So are appraisers and agents out of the woods? Not really. Lawsuits may still arise as society “opens up” and we become less cautious. The more immediate issue is related to what was mentioned earlier in this article – virtual inspections. Whether performed by a homeowner or other party, appraisers and agents are relying on data that cannot be verified as accurate. With almost half of E&O claims against agents and 75% against appraisers alleging inaccurate or incomplete reporting on property characteristics and defects, COVID restrictions and continued guidelines from the FHA (as recently as 2/10/21) only exacerbate this concern.

The immediate conclusion is that while the pandemic has wreaked havoc on many aspects of society, to this point it has minimally affected appraiser and agent liability, the concerns about virtual reporting and on-going pandemic issues to be determined.

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