



Chapter 18 Negligence: Professional — Appraiser Malpractice

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18

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A. [18.1] Cause of Action

The typical action against a real estate appraiser alleges that the appraiser breached duties owed to a client in providing services and seeks damages for economic loss. Frequently, the appraiser, engaged by a financial institution, is accused of over-appraising a property. In this scenario, if the property owner defaults on his or her loan, the property will not be worth the value of the mortgage. The financial institution will then sue the appraiser to recoup its economic loss.

B. [18.2] What Law Controls

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Title XI, 12 U.S.C. §3331, *et seq.* The purpose of FIRREA is to ensure that real estate appraisals are conducted in accordance with uniform standards. These standards require that all appraisals be performed in writing by individuals whose competency has been established and whose conduct will be supervised effectively. FIRREA established an Appraisal Standards Board to provide these guidelines, which were then promulgated as the Uniform Standards of Professional Appraisal Practice.

Uniform Standards of Professional Appraisal Practice (USPAP). USPAP guidelines are published annually and may be obtained through the Appraisal Foundation at www.appraisalfoundation.org. The guidelines are divided into Definitions, Preamble, Rules, Standards and Standards Rules (which include comments), and Statements on Appraisal Standards. For convenience of reference, Advisory Opinions are also included. These guidelines change from year to year, so it is critical that the publication year correspond with the year the appraisal was completed. Often, that may be several years before the loss occurs.

USPAP guidelines have been the subject of much debate and criticism as to whether they provide clear, concise appraisal standards. Among professional licensed appraisers, USPAP interpretations may often vary considerably as to what is acceptable appraisal procedure. However, the core principle embodied in USPAP guidelines is found in Standards Rule 1-1, which is relatively straightforward:

Standards Rule 1-1

* * *

In developing a real property appraisal, an appraiser must:

- a) **be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;**

* * *

- b) **not commit a substantial error of omission or commission that significantly affects an appraisal; and**

* * *

- c) **not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affect the credibility of those results.**

Comment: Perfection is impossible to attain, and competence does not require perfection. However, an appraiser must not render appraisal services in a careless or negligent manner. This Standards Rule requires an appraiser to use due diligence and due care.

Real Estate Appraiser Licensing Act of 2002, 225 ILCS 458/1-1, et seq. The Real Estate Appraiser Licensing Act of 2002 governs the administrative regulation of all licensed appraisers in Illinois and is administered by the Illinois Department of Financial and Professional Regulation (DFPR). By definition, its scope is limited to “evaluat[ing] the competency of persons engaged in the appraisal of real estate in connection with a federally related transaction.” 225 ILCS 458/1-5. Generally, any real estate transaction financed through a bank or savings and loan will be considered a federally related transaction.

Section 15-10 of the Act contains 18 specific disciplinary sections, the violation of which may constitute prima facie evidence of negligence, *e.g.*, violation of a statute. 225 ILCS 458/15-10(a). See Illinois Pattern Jury Instructions — Civil No. 60.01 (2006) (I.P.I. — Civil); *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976).

Additionally, the Act provides for the promulgation of administrative rules that contain a wide variety of other standards to which an appraiser is required to adhere. 68 Ill.Admin. Code §1455.10, *et seq.* Specific attention should be paid to §1455.250 of the rules, entitled “Grounds for Discipline,” which was written by Edward W. Williams, one of the authors of this chapter, for the DFPR in an attempt to eliminate the uncertainty and subjectivity of USPAP. The standards enumerated in §1455.250 cover the majority of the typical appraisal standard violations.

Illinois caselaw. There is only one reported Illinois appellate case that mentions professional appraisal malpractice, *Sampen v. Dabrowski*, 222 Ill.App.3d 918, 584 N.E.2d 493, 163 Ill.Dec. 314 (1st Dist. 1991). It is possible that a defendant appraiser, relying on *Sampen*, will contend that his or her deficient appraisal constitutes a non-actionable opinion of value. However, that case does not provide any meaningful guidance to the practitioner for several reasons. First, the sole question raised in that case was whether the plaintiffs could bring a consumer fraud claim against a real estate appraiser; no issue was raised concerning the plaintiffs' appraisal malpractice claim. Second, there was no discussion indicating that the plaintiffs had alleged that the defendant failed to comply with any applicable appraisal standards or had misrepresented that it had complied with a standard of care. Finally, the case arose *prior* to the adoption of appraisal licensure in Illinois and FIRREA.

From a plaintiff's perspective, a valid claim against an appraisal cannot be based on the position that the defendant appraiser concluded that the underlying property's market value was \$100,000, while another appraiser may have concluded that the market value was no more than \$90,000. Instead, it must be based on the substandard manner in which the defendant formulated his or her appraisal, usually shown through the defendant's failure to formulate an appraisal of market value that complied with mandatory USPAP guidelines.

While USPAP does not require that a real estate appraiser be perfect, it does establish a standard that requires an appraiser to use diligence and due care in formulating a market valuation and not render services in a careless or negligent manner. *See Private Mortgage Investment Services, Inc. v. Hotel & Club Associates, Inc.*, 296 F.3d 308, 315 (4th Cir. 2002) (it is failure to exercise due care that allows for claim against real estate appraiser).

Numerous other courts have upheld negligent misrepresentation and professional malpractice claims against real estate appraisers in connection with defective appraisals. *See generally id.* (appraiser liable to third party for negligent misrepresentation); *Superior Bank, F.S.B. v. Tandem National Mortgage, Inc.*, 197 F.Supp.2d 298, 311 (D.Md. 2000) (economic-loss doctrine did not bar repurchaser's negligent misrepresentation claim against appraiser); *First Federal Savings & Loan Association of Rochester v. Charter Appraisal Co.*, 247 Conn. 597, 724 A.2d 497 (1999) (affirming finding for plaintiff when appraiser overvalued real property and bank relied on appraisal); *Bolser v. Clark*, 110 Wn.App. 895, 43 P.3d 62, 65 (2002); *Fisher v. Comer Plantation, Inc.*, 772 So.2d 455, 462 (Ala. 2000); *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665, 668 – 669 (1995); *First State Savings Bank v. Albright & Associates of Ocala, Inc.*, 561 So.2d 1326, 1329 (Fla.App. 1990) (holding real estate appraiser may be liable to third parties for negligent misrepresentation), *overruled on other grounds by Garden v. Frier*, 602 So.2d 1273 (Fla. 1992); *Costa v. Neimon*, 123 Wis.2d 410, 366 N.W.2d 896, 898 (Wis.App. 1985) (real estate appraiser may be held liable to third parties not in privity for negligent misrepresentation); *Larsen v. United Federal Savings & Loan Association of Des Moines*, 300 N.W.2d 281, 289 (Iowa 1981).

C. [18.3] Elements

Grounds for common-law liability for professional negligence in real estate appraisal lie in the following:

1. Professional malpractice.
 - a. Agreement to perform services.
 - b. Duty to exercise professional skill and judgment.
 - c. Breach of duty.
 - d. Damages.
2. Negligent misrepresentation.
 - a. The appraiser is in the business of providing information.
 - b. The defendant knew that the plaintiff was intending to rely on the appraisal in making the loan at issue.
 - c. The appraiser owed a duty to convey accurate information in the appraisal concerning the fair market value of the underlying property.
 - d. The appraiser made false statements of material fact in the appraisal (*e.g.*, that the appraisal report and the fair market value articulated in that report complied with USPAP when, in fact, they did not).
 - e. The appraiser failed to exercise the reasonable care and competence of a certified appraiser because a reasonable and competent certified appraiser would have concluded that the fair market value of the property as of the appraisal date was no greater than the properly appraised value.
 - f. The plaintiff reasonably and justifiably relied on the appraisal in deciding to accept the property as collateral and to provide the loan at issue.
 - g. Damages.

D. [18.4] Relevant Standard Jury Instructions

While there are no specific instructions related to liability for an appraiser, the professional negligence jury instructions (I.P.I. — Civil No. 105.00 Series) address negligence cases brought against professionals. The introduction to this series of instructions states: “The same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances.” ILLINOIS PATTERN JURY INSTRUCTIONS — CIVIL (Thomson/West, 2006), p. 277.

E. [18.5] Statute of Limitations

The statute of limitations to bring a claim of professional negligence in real estate appraisal is five years. 735 ILCS 5/13-205.

F. [18.6] Parties

Proper plaintiff. Normally, a plaintiff (typically a lender) will have hired a licensed appraiser to provide real estate appraisal services for a fee. This arrangement is usually formalized with an engagement letter or some other memorialization establishing contractual privity.

Note that §1455.250(b) of the rules requires that the work file (required to be maintained by the appraiser for five years) must include the name of the client and the identity, by name or type, of any other intended users. 68 Ill.Admin. Code §1455.250(b). Any intended or foreseeable user is potentially a proper plaintiff.

Proper defendant. Any person licensed pursuant to the Real Estate Appraiser Licensing Act of 2002, 225 ILCS 458/1-1, *et seq.*, may be sued as well as any licensed appraiser who made a significant contribution to development and/or reporting of the appraisal.

G. [18.7] Remedies — Special Issues

No Illinois appellate court has yet had the opportunity to decide directly the issue of whether the *Moorman* doctrine (which generally prohibits a plaintiff from recovering in negligence for losses that are purely economic, *i.e.*, that do not involve personal injury or property damage) will bar a lawsuit for professional negligence against a real estate appraiser. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). However, decisions applying Illinois law have consistently stated that appraisers can be sued for negligence because they are in the “business of supplying information,” an explicit exception to the *Moorman* doctrine. 435 N.E.2d at 452.

For example, in *Lake County Grading Company of Libertyville, Inc. v. Great Lakes Agency, Inc.*, 226 Ill.App.3d 697, 589 N.E.2d 1128, 1131, 168 Ill.Dec. 728 (2d Dist. 1992), the court stated that the *Moorman* doctrine does not apply to a claim for negligence against “one who is in the business of supplying information . . . such as surveyors, credit bureaus, newspapers, auditors, termite inspectors and *appraisers*.” [Emphasis added.] [Citation omitted.] *See also Rogers Merchandising, Inc. v. Bojangles’ Corp.*, No. 87 C 5001, 1989 U.S. Dist. LEXIS 673 at *6 (N.D.Ill. Jan. 24, 1989) (“Only a few limited professions are subject to this extra-contract tort duty. Those professions traditionally included attorneys and doctors, and more recently architects, . . . accountants, . . . *appraisors*, and social workers.” [Emphasis added.] [Citations omitted.]). *See also Horsell Graphic Industries, Ltd. v. Valuation Counselors, Inc.*, 639 F.Supp. 1117, 1121 (N.D.Ill. 1986) (allowing negligence claim against appraisal firm and observing that “*Moorman* decision does not cover actions for professional malpractice”); *Freemont Financial Corp. v. IPC/Levy, Inc.*, 994 F.Supp. 988 (N.D.Ill. 1998) (finding commercial lender’s allegations against

appraiser sufficient to state cause of action for negligent misrepresentation); *Thomas Consolidated Industries, Inc. v. Koster Group, Inc.*, No. 00 C 1838, 2002 U.S. Dist. LEXIS 17200 (N.D.Ill. Sept. 11, 2002) (holding *Moorman* doctrine did not bar plaintiff's claim for negligent misrepresentation against equipment appraiser, but granting defendant summary judgment in absence of evidence that defendant failed to perform within standard of professionally certified appraiser).

H. [18.8] Checklist for Complaint

1. Jurisdictional facts/venue facts.
2. Relationship between the parties.
3. General nature of services to be rendered by the appraiser.
4. Factual allegations as to services performed by the appraiser.
5. Specific acts of appraisal negligence and corresponding USPAP and/or statutory violations.
6. Specific damages incurred as a proximate result of negligent acts or omissions of the appraiser (negligence).
7. Prayer for relief.

I. [18.9] Affirmative Defenses Specific to Cause of Action

Most appraisal reports contain exculpatory clauses, disclaiming all liability “arising out of this document.” These clauses are found in a section entitled “Statement of Assumptions or Limiting Conditions.” This section is comprised of mostly boilerplate disclaimers regarding a wide variety of environmental, zoning, title, etc., defects that the appraiser is exempting from the appraisal opinion.

No Illinois appellate court has addressed the issue of the enforceability of an exculpatory clause found in an appraisal agreement. In support of an argument against enforceability, it is worth noting that USPAP Standards Rule 1-1 specifically prohibits an appraiser from rendering appraisal services in a careless or negligent manner. See §18.2 above. It would then seem to follow that because Illinois law, in accordance with FIRREA and the rulemaking authority of the DFPR, has adopted and implemented the public policy that real estate appraisers must follow USPAP, an exculpatory clause exempting a real estate appraiser from this duty would violate this policy and therefore should be held unenforceable.

This conclusion is supported by the unsuccessful attempt by real estate brokers to rely on exculpatory provisions to avoid liability for their wrongful conduct. See *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill.App.3d 154, 510 N.E.2d 409, 109 Ill.Dec. 541 (1st Dist. 1986), in which the court found unenforceable an exculpatory provision on public policy grounds.

J. [18.10] Sample Form

[Caption]

COMPLAINT

Now comes Plaintiff, _____, by [his] [her] attorneys, _____, and complains of Defendant, _____, as follows:

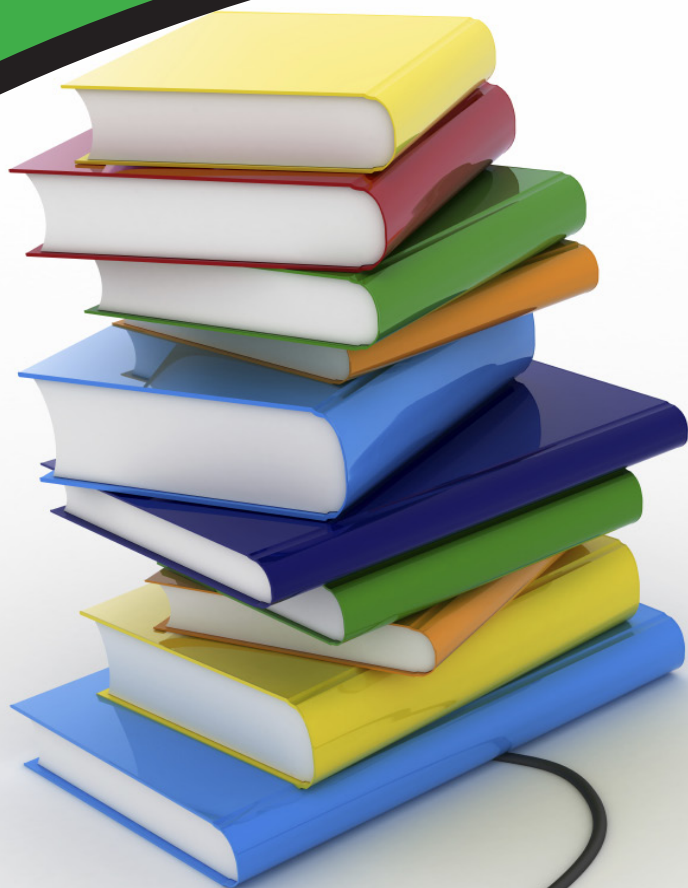
1. Plaintiff resides at [address].
2. Defendant resides at [address].
3. On or about [date], Defendant was a duly licensed real estate appraiser under the laws of the State of Illinois.
4. On or about [date], at _____, Illinois, Defendant agreed in writing to represent Plaintiff professionally in providing the following services, specifically [state scope of professional services provided by Defendant], in exchange for [describe consideration from Plaintiff to Defendant] (Agreement). A true and accurate copy of the Agreement is attached hereto as Exhibit __ and incorporated herein.
5. On or about [date], at _____, Illinois, while acting on behalf of Plaintiff pursuant to the Agreement, Defendant performed an appraisal of the real estate located at [location].
6. Defendant had a duty to exercise a reasonable degree of care and professional skill in the performance of said appraisal services.
7. Defendant breached [his] [her] duty to Plaintiff in one or more of the following respects: [list all specific negligent acts]
8. Each of the foregoing errors constitutes a violation of USPAP guidelines and Title XI of FIRREA for federally related financing.
9. A properly prepared appraisal, following USPAP guidelines, would have concluded that the fair market value of the property in [month and year of appraisal] was no greater than \$_____.
10. But for Defendant's above breaches of [his] [her] professional duties, Plaintiff would not have made a loan of \$_____.
11. As a consequence of the defects contained in the [month and year] appraisal, Plaintiff suffered a loss of \$_____.

WHEREFORE, Plaintiff prays that this Court enter judgment against Defendant in the amount of \$ _____, plus costs of suit and any further relief the Court deems fair and just.

Plaintiff



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