

Audio/video will begin at 10:00 a.m.

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Webinar: 2020 Legal and Risk Issues
May 15, 2020

Sponsored by:



LIA Administrators & Insurance Services



Appraisal
Institute®

North Carolina
Chapter



Introduction from the Chapter President



Chris Johnson MAI, SRA, AI-GRS, ASA
Managing Director | Carolinas
Colliers International
Valuation & Advisory Services

Join us for NCAI's Q2 Chapter Business Meeting (CBM) via [Zoom Meeting](#) on Thursday, June 11 at 2:00 pm.

Approved for 2 credit hours from the Appraisal Institute.



Introduction from the Chapter President

Peter Christensen is an attorney in Santa Barbara, CA. His law practice focused on legal and regulatory issues concerning real estate valuation.

He is the former general counsel of the Appraisal Institute's endorsed E&O provider LIA Administrators & Insurance Services.



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2020 Legal and Risk Issues for Appraisers

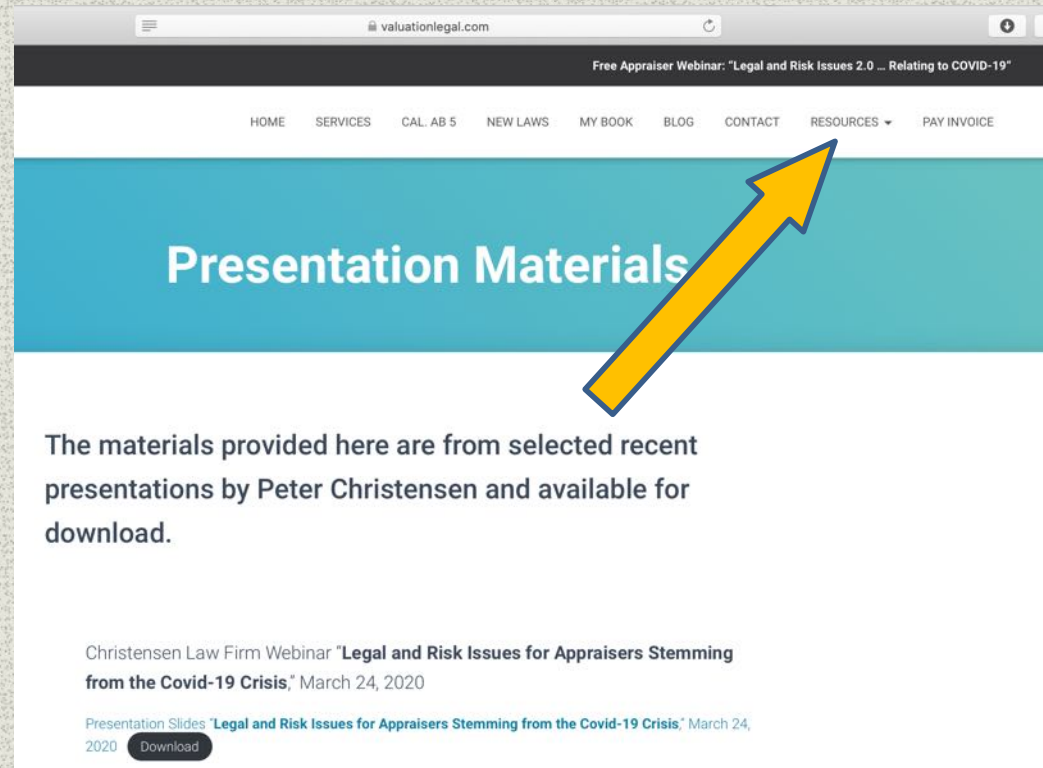
Where We Going This Morning?

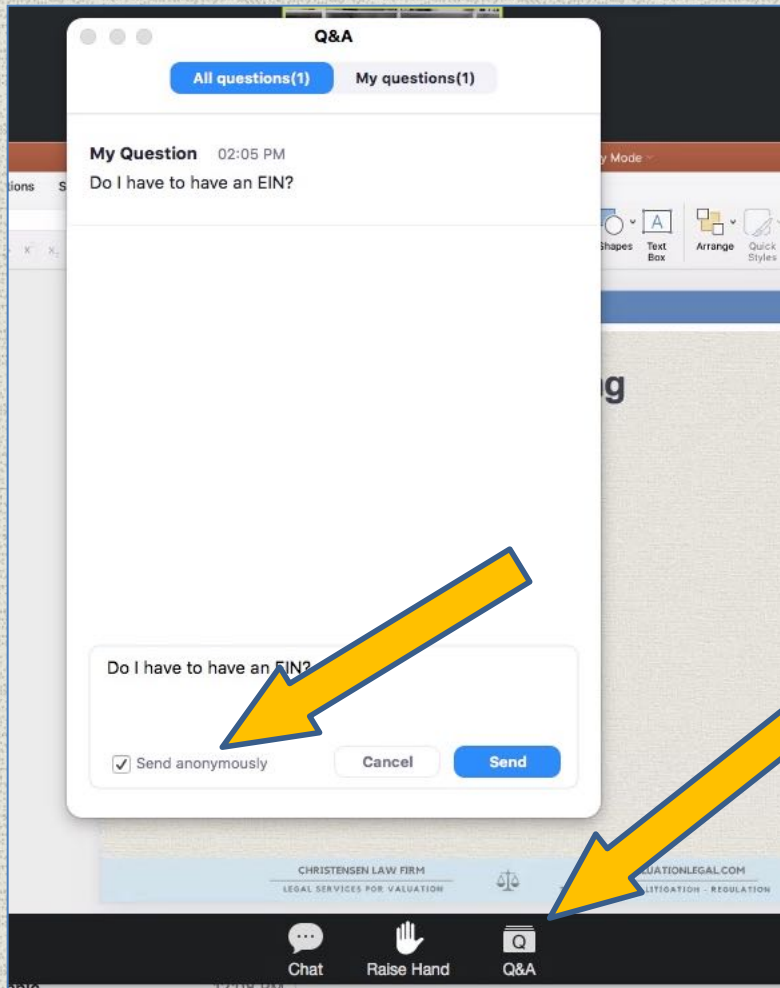
- The potential liability impacts for appraisers that may stem from the COVID-19 crisis.
- Concerns about future liability in relation to appraisal work generally.
- Examples of suggested language to consider including in appraisal reports.
- The single most important liability prevention measure that appraisers – both commercial and residential – can take in every appraisal report.
- Aiming for 50 minutes.



Light Housekeeping

- Don't worry I can't turn your microphone or video on – unless you ask me to.
- The slides I am using today will be available later today in the resources tab under www.valuationlegal.com.
- A link to a recording will be there too.





Q&A

- During the seminar, you can enter questions by moving your cursor to the bottom bar and revealing the Q&A button.
- You can make your Q's anonymous.
- I will answer Q's at the end.
- We won't using the "chat" or "raise hand" functions.

Legal and Liability Issues

➤ NCAI has the best chapter website page I've seen devoted to COVID-19 issues:

The screenshot shows the website for the Appraisal Institute North Carolina Chapter. The header includes the logo and navigation menu: Home, About Us, Education & Events, Find an Appraiser, Job Postings, and Chapter News & Resources.

NCAI Resources during COVID-19
Read [NCAI's Statement on COVID-19 \(Coronavirus\)](#) (3/27)

From NCAI

- [ECOA Valuations Rule Updated to Address Coronavirus](#) (5/7)
- [Second Round of Small Business Funding Approved](#) (5/5)
- [Credit Unions Allow Appraisals to be Delayed 4 Months](#) (5/4)
- April 22 Webinar - COVID-19 Chat: Economic Update with Mark Vitner – [Recording](#) | [PDF](#)
- [GSEs, Agencies Issue Coronavirus Guidance for Appraisers](#) (4/2)

State Resources

- [NC Auditor's Report on NCDOT](#) **NEW!**
- [NC Chamber Coronavirus Resource Guide](#)
- [NC Division of Public Health](#)
- [Mecklenburg County Transitions to State Order as Local Stay at Home Restrictions Time Out](#) (4/30)
- [Governor Extends Stay At Home Order Through May 8, Plans Three Phase Lifting of Restrictions Based on Virus Trends](#) (4/23)
- Stay-at-Home Orders/Essential Workers Guidelines
 - [State of North Carolina](#)
The North Carolina stay at home order allows for appraisals both of financial services-related purposes and as a standalone professional service (i.e., for non-financial services-related purposes). You still should maintain social distancing and take other precautions as necessary to protect both yourself and anyone that you may come into contact with. It is recommended you have your pocket card and copy of the stay at home order (digital or printed) when on inspections. Additionally, please reference other stay at home orders in places to which you are traveling as the more restrictive order will supersede the state order.
 - NC Counties/Cities

• Beaufort	• Madison
• Buncombe	• Mecklenburg
• Cabarrus	• Orange
• Clemmons	• Pitt
• Durham	• Wake
• Gaston	• Winston-Salem
• Greensboro	

Announcements

- COVID-19 Resources
- Become a Member
- Send Us Feedback

Job Postings

- Submit a Job Posting

Upcoming Events

- Fri May 15, 2020
[NCAI Connect: Legal and Risk Issues for Appraisers with Peter Christensen](#)
Category: Events
- Thu Jun 11, 2020
[Q2 Chapter Business Meeting](#)
Category: Events
- Tue Jul 14, 2020
[General Appraiser Income Approach – Part I](#)
Category: Education
- Tue Jul 21, 2020
[Quantitative Analysis](#)
Category: Education
- Tue Aug 11, 2020
[General Appraiser Income Approach – Part II](#)
Category: Education

[View Event List](#)

Our Blog

Legal and Liability Issues

- Let's start with a frequent issue I am being asked about in regard to legal issues for appraisal work stemming from the COVID-19 crisis.
- Questions about this issue are really the hardest to answer for me at least – 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 last Friday.

Legal and Liability Issues

“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

Another version of the question is:

“Can an appraiser, the bank or an AMC be liable to a borrower if the 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.”*

Legal and Liability Issues

- I'm not a personal injury lawyer, but to me - such claims are *plausible* if given great proof of compelling facts – but those facts are very unlikely to exist.
- The predominant claim would likely be for some form of negligence – unless a person intentionally ventured out knowing they were sick.
- But in the context of appraisals . . . the reality is that such claims would be very difficult claims to prove. Most claimants would find it very difficult to establish that a specific person or business is specifically responsible 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.)

Legal and Liability Issues


From NC REALTORS® COVID-19 FAQs:

QUESTION: Should I use a COVID-19 hold harmless agreement for sellers that show their homes but buyers may later contract the virus, or vice versa?

ANSWER: Before using COVID-19 hold harmless agreements, REALTORS® should consult their brokers and legal counsel in order to assess the risk and effectiveness of such agreements. In general, a hold harmless agreement protects a party from liability if another party is injured on their property or is injured during an inherently dangerous activity. In the case of a pandemic where the risks associated are not only widely known, but is also widespread, easily transmittable, and may not show symptoms for days after exposure, proving causation would be nearly impossible from a legal standpoint. As a result, NC REALTORS® does not plan to create COVID-19 hold harmless form or include language to an existing form. (Published 4/3/2020)

Legal and Liability Issues

- ✓ But, here in California, the California Association of Realtors is concerned enough about such 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.
- ✓ If you are asked to sign one, consider:
 1. Be watchful for indemnification language.
 2. Perhaps ask for copies of the forms signed by the seller and agent/broker.



CALIFORNIA ASSOCIATION OF REALTORS®

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

Property Address _____ Date _____

1. **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.
2. **"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.
3. **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.
4. **REPRESENTATION AND AGREEMENT:** By signing below, you make the following representations and agree as follows:
 - A. You are either:
 - (1) 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
 - (2) 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 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 or State "Safer at Home" or "Shelter in Place" orders and that you are conducting those activities at your own risk.
 - D. **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.**
 - E. 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:
 - (1) 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.
 - (2) 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.
 - (3) 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.
 - (4) You believe that you are not likely to transmit or contract COVID-19.
 - (5) 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.
 - (6) 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.
 - (7) 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.
 - (8) 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.
5. **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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REAL ESTATE BUSINESS SERVICES, LLC
a subsidiary of the CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue, Los Angeles, California 90020

PEAD 6/20 (PAGE 1 OF 1)



Legal and Liability Issues



**CALIFORNIA
ASSOCIATION
OF REALTORS®**

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

Property Address _____

Date _____

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(print name) _____


(signature) _____

Date _____

NATIONAL ASSOCIATION OF REALTORS® WHO SUBSCRIBE TO ITS CODE OF ETHICS:

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PEAD 6/20 (PAGE 1 OF 1)



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What is the more likely legal risk?

Economic Fallout Leading to 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, wide scale unemployment, and disruptions of lending.
- Will real estate price declines occur?
- *What happens when conditions like this occur with respect to claims against appraisers?*
- *Who files them most frequently?*
- *Let's talk about some suggestions on what appraisers should be doing going forward.*

Suggestions on Language for Reports

Slide 16

- **In the short term, consider a short statement about COVID-19 and market conditions – but we’re now probably getting too deep into the situation to still say the effect aren’t “measurable.”**

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.

So, appraisers will must 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).



Suggestions on Language for Reports

Slide 17

- What about how appraisers should handle the new “flexible” ways of reporting appraisals - often with no interior inspection by the appraiser and sometimes solely a desktop?
- It's important to restate the obvious . . . plain English is the key.
- When preparing a Desktop or Exterior Only appraisal, it is important to restate the obvious within the report, that being ... the appraiser:

“...did not perform a personal visual inspection of the interior or the exterior of the subject property...”, or

“...performed a personal visual inspection of the exterior of the subject property from the street and did not conduct any interior visual inspection of the subject property, whatsoever...”



Suggestions on Language for Reports

Slide 18

- Use **plain English** in reports to explain when 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, is it relevant for the appraiser to 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.



Suggestions on Language for Reports

Slide 19

- **Explain what you did in the report and make sure you have support in the work file...**
- **This is not the time to rely on just “canned” or vague language...the same general language should not be dropped into every report. Saying the appraiser reviewed “existing public and private sources” is not sufficient. There should be facts, information and details in plain English.**
- **And supplement your work files with good notes. What were you asked to do? What special discussions did you have with the client? Remember that claims are rarely made within weeks of a report being completed. Rather, you may be called upon to defend a report months or years after it was prepared.**



The Most Important Liability Prevention Language in Reports

How to deal with the prospect of increased borrower and purchaser claims?

- First, North Carolina is fortunate to have established good case law favorable to appraisers as a result of the last financial crisis and the litigation that followed.
- A key case is Arnesen v. Rivers Edge Golf Club & Plantation, Inc., 781 S.E.2d 1 (N.C. 2015).
- Purchasers of undeveloped resort lots who purchased in 2005-06 in Brunswick County sued BB&T and an appraisal firm and its appraisers in 2010.
- Alleged appraisers negligently (and otherwise) inflated the values.
- Purchasers alleged they would never have completed purchases unless the appraisals had been inflated.

Arnesen v. Rivers Edge Golf Club & Plantation, Inc.

- **As the North Carolina Supreme Court Summarized: “each of plaintiffs' claims against the Appraisers . . . depends on an alleged duty of care owed by the Appraisers, coupled with assertions that plaintiffs justifiably relied on their faulty appraisals and that the Appraisers proximately caused plaintiffs' injury.**
- **So, did the appraisers owe a duty of care to the borrowers? That's really the key issue in any borrower case.**
- **The Court analogized the situation to accountant liability to third parties: “An accountant who prepares financial reports for his client clearly owes a duty of care to his client...; however, the duty may extend to “persons ... whom [the accountant] knows and intends will rely on his opinion...,”**

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Arnesen v. Rivers Edge Golf Club & Plantation, Inc.

➤ Here's what the Court reasoned:

“Plaintiffs here fail to establish that the Appraisers owed them a duty of care. The complaint reveals that BB & T, not plaintiffs, hired the Appraisers to evaluate properties for the bank's own internal underwriting purposes At no time did plaintiffs engage, communicate with, or deal with the Appraisers directly, nor did plaintiffs receive, review, or request any information from the Appraisers...”

- **The Court then upheld the trial court's dismissal of the case.**
- **So, there's good in that decision – and just a little bad.**
- **How can you make it better for yourself?**

The Most Important Liability Prevention Language in Reports

- **Add some very directed language in your reports – for example:**

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. Neither payment for the appraisal nor receipt of a copy of the appraisal by such a party or any other third party means 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.

A Reminder About Traditional Key Language in Reports

- **Also, never forget to include the equivalent to language similar to the following:**

This appraisal report is not a home inspection. It does not guarantee or imply that the house is free of defects or property condition problems. The appraiser is not a home inspector. It is suggested that the borrower secure a professional inspection of the property and take the necessary steps to insure the house is acceptable to them prior to closing escrow.

Suggestions on Language for Reports

- **If you are preparing residential appraisals under the various new guidelines Fannie Mae and Freddie Mac or other flexible report options on a form being used for a different purpose than originally intended, explain something similar to the following:**

Because of the impacts of COVID-19, the appraiser has been requested to report this appraisal on a pre-printed form that was contemplated for a different scope of work by the appraiser that may normally have included a personal inspection by the appraiser of the property. Accordingly, this appraisal report (particularly the pre-printed information concerning the appraiser's scope of work, limiting conditions and certifications) should be read in the context of the changes requested and the modified language and text adopted in response to the impacts of COVID-19.

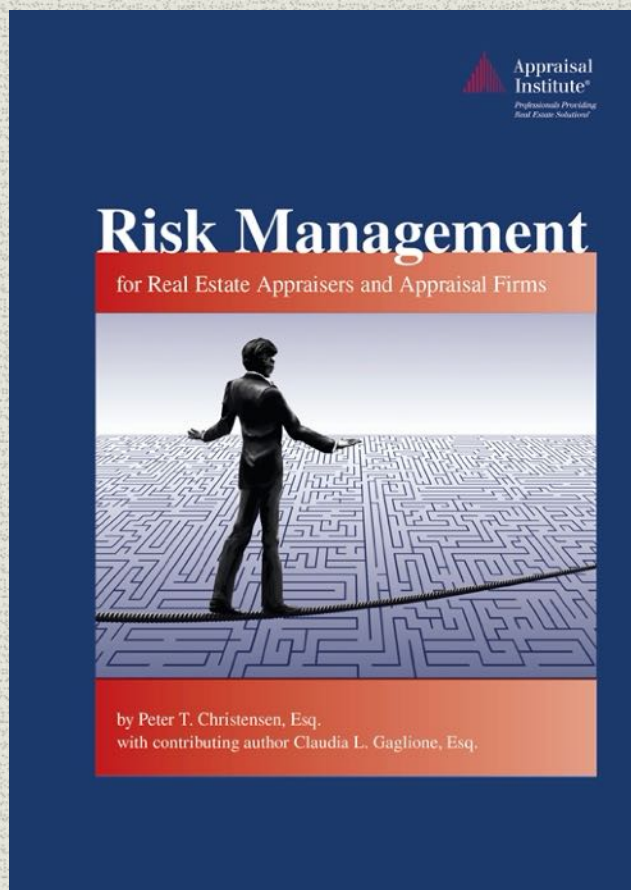


Lessons from the Financial Crisis

- **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 and price effects as changes become measurable.**



Drawing for the “prize”



Thank You

Peter Christensen
Christensen Law Firm
Santa Barbara, CA
805-696-2600
www.valuationlegal.com
peter@valuationlegal.com

