

**LIMITING YOUR LIABILITY:
PROTECTING YOURSELF FROM YOURSELF, OTHERS AND THE IDFPR**

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APPRAISER LIABILITY

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Breach of Contract

A breach of a promise to someone with whom you have an agreement. May involve non-performance or poor performance.

Liability to Third Parties

An individual who is not a party to the contract can enforce the contract only when the parties entered into the contract with the intent to benefit that individual, as a third-party beneficiary. An individual who only incidentally benefits from the contract does not have third-party beneficiary rights. *Cahill v. E. Benefit Sys., Inc.*, 603 N.E.2d 788, 792-93 (Ill. App. Ct. 1992); *Bescor, Inc. v. Chi. Title & Trust Co.*, 446 N.E.2d 1209, 1213-14 (Ill. App. Ct. 1983).

Tort Liability for Negligent Misrepresentation

A breach of a duty of ordinary care and competence that is reasonably expected of members in the profession. Under the *Moorman* doctrine, a purely economic loss (one that is not accompanied by personal injury or property damage) is not recoverable in tort. There are a few exceptions, including:

- Intentional misrepresentation or fraud; and
- Negligent misrepresentation made by someone who is in the business of supplying information to others that will be used in making their business decisions or otherwise used as guidance. This requires a showing of actual reliance and is limited to the person(s) for whose benefit and guidance the information was intended. *Tolan & Sons, Inc. v. KLLM*

Architects, Inc., 719 N.E.2d 288, 296-97 (Ill. App. Ct. 1999); *Kelley v. Carbone*, 837 N.E.2d 438, 442-43 (Ill. App. Ct. 2005). Further, a claim of negligent misrepresentation must be based on a material fact, rather than an opinion. *Buzzard v. Bolger*, 453 N.E.2d 1129, 1131-32 (Ill. App. Ct. 1983).

Consumer Fraud

Real estate appraisers and brokers engage in “trade or commerce” as defined in the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq.* There is no liability under the Act, however, unless one knows of the false, misleading or deceptive character of the information being supplied. *Sampen v. Dabrowski*, 584 N.E.2d 493, 495-99 (Ill. App. Ct. 1991). Appraisers should not be liable under the Act for failure to note or disclose latent or hidden defects. *Harkala v. Wildwood Realty, Inc.*, 558 N.E.2d 195, 199-200 (Ill. App. Ct. 1990).

Mortgage Fraud

- Legitimate appraisal but unknowingly or unintentionally part of a criminal scheme;
- Inflated appraisal “to make the numbers work” or to “get/keep the business;” and
- Forged appraisal “to make the numbers work” or to “get/keep the business.”

Damages

Placing the injured party in the position he or she would have been in had the contract been performed as intended. May include:

- Lost profits;
- Costs of repairing/remedying defects omitted in the report;
- Appraisal fee;
- Other expenses proximately caused by appraiser’s breach/negligence;
- Interest (if damages are liquidated or determinable as of a particular date); and

- Punitive damages (if gross negligence or fraud is involved).

LIMITING YOUR LIABILITY IN THE CONTRACT

Contractual limitations of liability present conflicting public policy concerns that: (i) persons should be liable for their negligent acts; and (ii) persons should have the right to freely contract with regards to their own affairs. *Simmons v.*

Columbus Venetian Stevens Bldgs., Inc., 155 N.E.2d 372, 377 (Ill. App. Ct. 1959). Such limitations are generally enforceable in Illinois, unless they violate a strong public policy of the state or are unconscionable. *Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265, 275-77 (Ill. App. Ct. 2009).

When the contractual provisions seek to absolve the breaching party of any liability, courts will strictly construe the exculpatory language against the benefitted party. *Orion Refining Corp. v. UOP*, 259 S.W.3d 749, 762-63 (Tex. App. 2007) (citing *Jewelers Mut. Ins. Co. v. Firststar Bank Ill.*, 820 N.E.2d 411, 413-16 (Ill. 2004)). Provisions that merely limit remedies do not render a contract unenforceable. *Id.* Effective exculpatory provisions should contain clear, explicit and unequivocal language evidencing the parties' intent. *Calarco v. YMCA of Greater Metro. Chi.*, 501 N.E.2d 268, 270-73 (Ill. App. Ct. 1986).

OTHER PREVENTATIVE MEASURES

- Prominently and repeatedly state or disclose any limitations of liability in the engagement/retainer letter and appraisal report, if possible;
- Clearly identify the client and the intended user, the purpose of the appraisal and the scope of the work;
- Affirmatively state that the appraisal report:
 - Is an opinion, not to be relied upon by any third parties (whether disclosed or undisclosed);
 - Was prepared solely for the use described in the scope of work and is time and market sensitive; and
 - Is not a substitute for a property inspection, and you are not an engineer or a surveyor.
- Include a statute of limitations (i.e. suits/claims must be brought within a

- certain amount of time) in the engagement letter and report. Require that notice of any suit/claim be made in writing and only to a designated individual (your lawyer);
- Provide for alternative dispute resolution, such as mediation or arbitration, rather than litigation;
 - Provide that the prevailing party in arbitration or litigation is entitled to reimbursement of his reasonable attorney's fees and costs;
 - Include a limitation of damages provision, limiting damages to the cost of appraisal or another reasonable amount;
 - Provide for a waiver of any claim to special, consequential or punitive damages; and
 - Be otherwise proactive -- explain everything, but make sure you can defend it.

RELEVANT STATUTES

Anti-Indemnity Act for Construction Contracts, 740 ILCS 35/1

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any move, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Anti-Indemnity Act for Landlord & Tenants, 765 ILCS 705/1

(a) Except as otherwise provided in subsection (b), every covenant, agreement, or understanding in or in connection with or collateral to any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his or her agents, servants or employees, in the operation or maintenance of the demised premises or real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

(b) Subsection (a) does not apply to a provision in a non-residential lease that exempts the lessor from liability for property damage.