



Legally Insured

Arming yourself against disgruntled property owners

BY PETER CHRISTENSEN

Several years ago, I fielded a call from a real estate appraiser reporting a potential claim. She told me that she had recently inspected a vacant residential property and was being threatened with a lawsuit by the owner. When I asked for details, she explained that after arriving at the property, the owner had greeted her and let her inside. The owner then left her alone to complete the inspection, instructing her to lock the front door behind her after finishing.

A week later, she got an angry call from the owner. He accused her of leaving water running in a bathroom sink, claiming that the sink had overflowed for a long period of time, causing extensive water damage. He

threatened to sue her unless she paid for the repairs. At the end of the day, the appraiser stood her ground. She had not turned on the sink. She explained to me that if she needed to use a restroom, she would not have used the decrepit facilities in the vacant home, and she had photos showing their sorry state. The owner eventually backed down and did not sue.

While this is not necessarily a big or a typical claim against an appraiser or other right of way professional, there is a teaching point to it. It is to illustrate why right of way professionals may want to carry insurance that will protect them against legal claims relating to their services.



Two Primary Types

There are two primary insurance policies maintained by right of way professionals. One is general liability (GL) and the other is professional liability, often referred to as errors and omissions insurance (E&O). Both forms of coverage are commonly required in government contracts for right of way work but are often times misunderstood.

The GL policy is designed for two purposes: 1) claims involving bodily injury and 2) property damage arising from services/operations. If a property owner sues the appraiser for water damage, a GL policy would pay for the appraiser's legal defense and/or the damages because the claim is property related. If the story had involved someone slipping in the overflowing water, the defense of that claim would also be under a GL policy because of the bodily injury. The reality is that property damages and bodily injury claims are rarely filed against appraisers and right of way agents. However, they are a bit more common against relocation agents.

The key limitation of a standard GL policy is that it does not cover claims for economic harm to a third party arising from your services. For example, consider a common professional negligence claim: an appraiser makes a negligent overvaluation mistake causing the client to significantly overpay for a property, and the client sues the appraiser for its financial loss. Because this scenario does not involve bodily injury or property damage, a GL policy would not provide coverage. This is where E&O comes in.

E&O covers claims for economic losses due to errors and omissions in your professional services.

In practice, E&O claims are more common than GL claims among professionals that provide right of way services, and this is why E&O generally costs more than GL for such professionals.

Avoiding Common Claims

To reduce the risk and insure yourself properly, it's best to focus on the most common claims and think about how they can be avoided. Based on our experience and research, here are the most common legal claims seen in practice for right of way agents, appraisers and relocation agents stemming from services offered:

Right of Way Agents

In a case filed earlier this year, a large right of way services firm was sued by 20 plaintiff property owners who all resided in the same county. The case relates to a pipeline, and the right of way agents allegedly negotiated with the property owners on behalf of the pipeline company to acquire easements for its construction and permanent placement. The owners had accepted offers of compensation, signed easement agreements and received payment in full. But now they were suing the right of way services firm contending that they had been misled into accepting compensation that was too low.

This is a difficult claim to sustain legally because easement agreements typically contain contractual clauses under which the owners represent that any agreements or promises relevant to their acceptance of the compensation are contained within the easement agreement itself. In other words, the owners contractually state that everything they've been promised is contained in the agreement and that the agreement is final as to what they are entitled to. So to get around that legal challenge, the plaintiffs in the case are doing what others commonly try—alleging

that they were fraudulently induced by false statements to enter into the agreements. They claim: "The right of way agent told me that the amount offered was the best anyone in my county would ever get," or "I was told that if I didn't sign the agreement, I'd be sued in a condemnation lawsuit and end up with less."

This lawsuit is typical of professional liability claims against right of way agents because the plaintiffs are aggrieved property owners who are unhappy with the result after the fact. In practice, right of way agents are less commonly sued by their own clients. We have also observed from actual claims that right of way agents working on public acquisition projects for governmental entities are far less likely to be sued by anyone in connection with their work than those performing similar services for the private sector, such as for pipeline projects or for the acquisition of rights in connection with oil, gas or mineral extraction. We believe that a major reason for the difference in liability risk may be linked to greater oversight of the overall process by governmental entities and stricter legal concern for the protection of property owners' interests.

Real Property Appraisers

Appraisers performing valuation services for right of way purposes also face claims from disappointed property owners. The property owner will allege, again in hindsight, that they accepted unreasonably low compensation because the appraisal they were provided negligently valued the taken property. In other claims, even property owners who turned down an offer based on an allegedly low appraisal and recovered more in the condemnation action have sued appraisers—their claim being that if the appraisal had been higher, the property owner would not have incurred the time and expense of litigation.



While E&O claims from third parties (i.e., non-clients) are most common, appraisers performing right of way work do get legal claims from their own clients if it's believed that the valuation was negligently performed. Fortunately, it is rare that a governmental entity will actually decide to sue an appraiser engaged on its behalf.

There is, however, a common series of events that emerges in situations where the government has actually made a claim against an appraiser. The claims are usually brought when: a) a court hearing a condemnation action has pointed to outright errors or omissions in the appraisal work (not merely differences of opinion) as the basis for an unfavorable decision, b) the government entity client has decided to withhold the appraiser's final payment because of deficient work, and c) the appraiser has provoked the government entity by suing the government to collect the unpaid fee.

The predictable result is that the government files a counterclaim for professional negligence against the appraiser. The lesson from this is that if your client has been hit with a very bad outcome in which the court pointed to your appraisal as being negligently performed, think hard before suing your client to collect on that particular work.

Relocation Agents

Relocation agents are in a tough spot when it comes to claims. Much of their job often involves day-to-day contact with property owners being displaced by a project. Whether they are working with an owner on a move or arranging for temporary accommodations, relocations can put both residential and commercial property owners/occupants under stress and in financial hardship. Their close involvement with displaced

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For example, will the moving company they referred break an urn containing the ashes of the property owner's mother, and the relocation agent gets blamed for negligently recommending them? Believe it or not, this is an actual claim that happened. Or will the agent be accused of promising relocation benefits that never materialize? Although it's difficult to pinpoint what the subject will be, as with right of way agents and appraisers, most claims against relocation agents come from the property owner or occupant, not their clients.

Being Adequately Prepared

While it's difficult to address every situation that a right of way professional may face, we can offer some suggested basic practices that will help prevent claims from happening, or at least make them easier to defend.

Keep contact logs. We suggest keeping detailed, contemporaneous logs of each contact with property owners/occupants. These parties are the most common sources of claims. Good contact logs can help prevent claims assuring that communications are accurate,

timely and consistent. They can also work to defend potential claims by providing credible evidence to back up your actions.

Beware of difficult parties. When you run into a difficult property owner/occupant, tread carefully. In our experience, these acerbic individuals are the ones most likely to drag you into court.

Oversee your accounts receivable. You want to get paid, of course. Aside from that, keeping control of accounts receivable reduces liability claims because suing to collect from a client for unpaid fees creates the risk of the client countering with a professional liability claim.

By being fully aware of the most common risks—and following some basic best practices—right of way professionals can protect themselves from potential legal claims. ✪



Peter Christensen is General Counsel for LIA Administrators & Insurance Services and has been an attorney since 1993. LIA has been offering errors and omission insurance to the appraisal profession since 1977.