

Legal Update - 2017 Florida Court of Appeals case dismisses professional negligence claim against appraiser based upon intended user provision

By Michael McCormick, Esq.

On August 23, 2017, the Florida Court of Appeals issued an opinion affirming the dismissal of a lawsuit for professional negligence against an appraiser brought by a loan claim servicer. *Llano Financing Group, LLC v. Yespy*, 2017 WL 3616396 (Fl. App. 2017) (unpublished and subject to revision or withdrawal). The court dismissed the case because, among other things, the claim servicer was not an intended user of the appraisal.

In the original refinance transaction, the homeowner/borrower employed a mortgage broker who in turn hired the appraiser. The appraisal listed the mortgage broker as the “Lender/Client”. The appraisal stated the mortgage broker could “distribute” the report to the “borrower, other lenders, the mortgagee, or its successors and assigns, and secondary market participants.” These persons could also “rely on this appraisal report as part of any mortgage finance transaction” In a different section, the appraisal stated: “THE CLIENT IS THE INTENDED USER OF THIS REPORT. NO OTHER INTENDED USERS HAVE BEEN IDENTIFIED BY THE APPRAISER.” (emphasis in original).

After closing, the mortgage was sold to a series of lenders. The right to assert negligence claims was then assigned to a series of companies, the last of which was the “claim servicer”, i.e. Llano Financing Group (“Llano”), the Plaintiff in the case. Llano alleged damages because the home’s actual value was less than the appraised value and the property was foreclosed on. Llano alleged it could bring a claim against the appraiser under § 552 of the Restatement (Second) of Torts. In a nutshell and subject to certain limitations, § 552 (which has been adopted in Colorado), allows a person to sue a professional if the professional intended to supply the information to that person to rely upon and influence a transaction. Based upon Florida case law and the intended user provisions in the appraisal, the Florida Court of Appeals decided that because Llano was not involved in the original mortgage transaction, Llano did not have standing because it could not justifiably rely on the appraisal to bring a claim under § 552.

In Colorado, liability for negligent misrepresentation “is limited to loss suffered ... by the person

or one of a limited group of persons for whose benefit and guidance [the alleged tortfeasor] intends to supply the information or knows that the recipient intends to supply it.” *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank, N.A.*, 892 P.2d 230, 236 (Colo.1995) (quoting Restatement [Second] of Torts § 522); *see also Wolther v. Schaarschmidt*, 738 P.2d 25 (Colo. App. 1987) (even though homebuyer did not receive copy of engineering report used by the appraiser before closing, engineer could be liable to homebuyer under § 522 because engineer knew the report would influence the loan transaction and the homebuyer could have relied upon lender’s approval of the loan as confirmation that the engineer’s report was favorable).

The Colorado Courts have not yet construed § 522 in the context of an appraisal. However, the *Llano* case illustrates the potential dangers of broad and conflicting intended user provisions. Recall that one of the provisions in the appraisal allowed reliance by the “mortgagee or its successors and assigns... and other secondary market participants as part of any mortgage finance transaction” The Florida court could have decided that this provision meant the appraiser intended for a subsequent purchaser of the loan to rely on the appraisal as a part of any transfers of the loan and also for any assignees to rely on the appraisal as part of any assignment transactions. Fortunately for the appraiser, the Florida court was instead persuaded by another provision in the appraisal limiting reliance solely to the client (i.e. the original lender) as well as by prior Florida caselaw construing § 522 of the Restatement.

Please contact me at (303) 773-8100 mmcormick@montgomerylittle.com if you have questions or concerns about this article or the *Llano* case.

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