

Risk v. Reward: The LandSafe Appraisal Service Agreement

By Peter B. Rustin & Peter C. Catalanotti

Many appraisers have received a new proposed Agreement from LandSafe, the appraisal management company for Bank of America. In the latest iteration of the LandSafe Agreement, the appraisers are asked to contractually accept many obligations, such as accounting audits, confidentiality, record retention for a period of 10 years, and dispute resolution in Plano, Texas.

Deciding whether to sign such an agreement must be made on an individual basis. Each appraiser must decide whether the work he or she will receive from LandSafe after signing the Agreement is worth the significant rights that the appraiser gives up. What follows is a summary of some of the more important provisions contained in the Agreement that should be given additional attention.

An especially noteworthy provision in the new LandSafe Agreement is the indemnity section. Under paragraph 14.1 of the agreement, appraisers agree as follows:

14.1: Appraiser shall indemnify, defend and hold harmless LandSafe and its Representatives, successors and permitted assigns from and against and against any and all claims or legal actions of whatever kind of nature that are made or threatened by any third party and all related losses, expenses, damages, costs and liabilities, including reasonable attorneys' fees and expenses incurred in investigation, defense or settlement ("Damages"), which arise out of, are alleged to arise out of, or relate to the following: (a) any negligent act or omission or willful misconduct by Appraiser or its Representatives engaged by Appraiser in the performance of Appraiser's obligations under this Agreement; or (b) any breach in a representation, covenant or obligation of appraiser contained in this Agreement.

This obligation to indemnify LandSafe may have some undesired and unintended consequences.

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Although an appraiser is generally liable for the quality of his or her work, and owes a duty to prepare an appraisal with due care that complies with USPAP, the acceptance of a contractual indemnity provision raises other potentially serious issues. First, the statute of limitations may be different for these obligations. For example, in California, the statute of limitations for negligence will generally be two years from the date of discovery. See California Code of Civil Procedure, Section 339. This limitations period, however, doubles to a four year limitation period for lawsuits based upon obligations incurred by virtue of a written contract. See California Code of Civil Procedure Section 337. Therefore, by agreeing to the indemnification provisions in the LandSafe Agreement, an appraiser potentially doubles the period of time that he or she could be held liable for his or her work.

Another unintended consequence of the indemnity provision is that it may affect an appraiser's errors and omissions insurance coverage. Many errors and omissions policies contain exclusions or exceptions for obligations imposed by contract. Therefore, an appraiser sued by LandSafe to enforce the indemnity provision may find itself without coverage for a claim of breach of contract that arises under the hold harmless provision. It is also possible that an insurance carrier could agree to defend a lawsuit in which an indemnity claim is brought, but reserve its right to actually pay damages that are found to arise from the indemnity provision. Although as a practical matter, the appraiser will likely be sued for negligence as well, which generally would be covered, agreeing to indemnify LandSafe could give rise to a situation in which an appraiser finds itself facing an uncovered risk.

Again, the decision to sign this type of Agreement will come down to a business decision: Is the risk of additional exposure worth the reward of the additional work that affiliation with LandSafe will provide? The answer will depend largely upon any given appraiser's view of whether the revenue from working with LandSafe is worth incurring a contingent liability that could extend years into the future.

Since Agreements vary widely, each appraiser is encouraged to review the individual agreement carefully and address any concerns directly with his or her insurance carrier and a licensed personal attorney.

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LANDSAFE APPRAISAL SERVICES AGREEMENT

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In 2003, he received his Juris Doctorate from Temple University School of Law, where he was the recipient of the Summer Corps Grant from Equal Justice Works, and a Labor Law Grant from the Peggy Browning Fund. He was also awarded with "Distinguished Class Performance" in the areas of Professional Responsibility and Labor Law. In 1999, he received his Bachelor of Arts degrees in Psychology and Political Science from Fairfield University.

Prior to joining Manning & Kass, Ellrod, Ramirez, Trester LLP, Mr. Catalanotti worked at a civil litigation firm in San Francisco, specializing in real estate, employment, and landlord/tenant law. In 2009, 2010 and again in 2011, Mr. Catalanotti received the distinction of being named as a "Super Lawyer Rising Star" by Law & Politics Magazine.

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Peter received his Bachelor of Science degree from Connecticut College, Connecticut in 1978 and his Juris Doctorate from Washington College of Law, American University in 1982, where he graduated in the top 20% of his class. During law school Peter served as Note and Comment Editor for the American University Law Review.

Prior to joining the firm, Peter spent several years with the Office of the General Counsel, United States Department of Housing and Urban Development in Washington, D.C. In addition, he worked for a private practice in Connecticut, where he specialized in appellate law, and successfully briefed and argued over 30 decisions. In 1996 he moved to California and joined a small firm specializing in real estate and business disputes with a concentration on defending real estate agents and brokers.

Peter is a member of the District of Columbia Bar and the state bars of Connecticut, Maryland and California. Peter has been a drummer for 45 years and can often be found riding his motorcycle or watching the Boston Red Sox.

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