

## REAL Risks

A Risk Management Newsletter for  
Real Estate Professionals from  
Travelers' Bond & Financial Products



### Pitfalls of BPOs

With the economic downturn, the real estate industry has seen an increase in brokers' price opinions, or BPOs, for short sales and foreclosures. A BPO is a method that brokers and/or sales associates use to estimate the probable selling price of real property. It is important to note that appraisers determine property market values, but a BPO determines the recommended property price, a difference which we will explore in this article. Recently, BPOs have become a way for brokers and sales associates to supplement income and for banks, mortgagors and sellers to save significant costs over obtaining certified appraisals for specific properties. Where a certified appraisal may cost hundreds of dollars, a BPO can usually be obtained for about \$50.

While BPOs may be accurate in homogenous markets where there has been little value movement and relatively consistent price points in a given area, BPOs are more subjective and, thus, of greater concern where a wider disparity exists in comparables or in areas where there are insufficient comparables for comparison. Several studies have found that BPOs have artificially deflated home selling prices, which, among other things, could expose a broker or sales associate to unforeseen liability for incorrect, inaccurate or unsubstantiated opinions. Below are just a few things to consider before you issue a BPO.

First, is a BPO legal in your jurisdiction? Congress has yet to uniformly outlaw BPOs, but several states have limitations.

1. Unlimited Authority: Currently, there are no limitations on real estate brokers and salespersons performing price and/or valuation analyses, including appraisals and non-federally related transactions in Alaska, Illinois, Indiana, Iowa, Montana, New York, Oklahoma, and South Dakota.
2. Broad Authority: Real estate brokers and sales associates may perform broker price opinions, competitive market analysis, etc., as part of the listing process, and for other purposes. A broker or salesperson has the option to charge a fee for their services in Arizona, California, Colorado, Florida, Kansas, Louisiana, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, South Carolina, Texas, Washington, Wyoming, and Virginia.
3. Limited Authority: A real estate broker or salesperson may only perform a brokers' price opinion, competitive market analysis, etc..., as part of the real estate listing process. In some cases, brokers and sales associates are prohibited from charging a fee or receiving any form of compensation in Alaska, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, New Jersey, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin and West Virginia.

Second, do you have clear guidelines covering BPOs? In the event that you or your sales associates are providing BPOs, are guidelines in place that cover what can be charged, who can handle the fees, and who keeps the records? Failure to follow state laws regarding record keeping and fees can put you at risk for liability. Know your specific jurisdiction to make sure you comply with all relevant laws where you issue BPOs.

Third, could you be liable for providing a property price below market value? Some brokers and sales associates have incentive to provide lower than market price opinions in order to receive additional BPO requests from banks, mortgagors or sellers. While certified real estate appraisals are governed by the Uniform Standards of Professional Appraisal Practice (USPAP) standards, BPOs are less regulated and thus there may be a wider disparity in opinions. Brokers and sales associates should be wary of providing price opinions that are below market value for fear that a seller may claim that a sale occurred at far below market value and that the broker or sales associate should be liable for the difference between the price opinion and the accurate market value. In addition, some insurers do not specifically cover liability for BPOs. In that instance, a broker or sales associate would have to defend a suit with no insurance coverage.

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FOR SALE  
**OPEN  
HOUSE**

**OPEN  
HOUSE**

### Warning: You Just Became a Property Manager

Unless you are Rip Van Winkle, it is clear to you and all others in the real estate services profession that the marketplace for residential and commercial property, and for those interested in investing in these assets, has drastically changed. Real estate professionals, buyers, sellers and investors are faced with excess inventory of all types of properties. As a result, many are seeking creative solutions to turn vacant houses and commercial space into break even, if not profitable, ventures. There are many ways this can be accomplished, whether a homeowner entering into a lease/purchase agreement, a condominium developer listing units for sale while at the same time placing them on the rental market, or commercial developers and landlords entering into short term lease agreements in order to fill vacant storefronts. As a real estate professional, you may be presented with the opportunity to list for sale various assets that come with the string of unintended consequences attached to the listing agreement. In pursuit of the listing agreement, it becomes all too easy to agree to undertake the duties of a property manager as an added service or incentive for the seller to list the property with you and your agency.

These added responsibilities can take many forms. It may be an agreement to collect rents, provide for building maintenance and repair, groundskeepers, administrative support and attendant financial accounting and reporting. These services may be provided for an agreed upon fee in addition to an agreed upon commission once a property is sold, or may be purely gratuitous. Regardless of the form of the agreement, the activity undertaken bestows upon you the title of property manager. For the unwary and even the experienced real estate professional, the following are the top five things you should do to protect yourself and your company from unwanted or worse, uninsured liability.

#### **FIRST, PUT IT IN WRITING.**

Whether intended as an extra benefit or service as part of obtaining the listing agreement, an obligation to perform any activity on behalf of the owner/seller that could be considered property management must be clearly defined.

**Property Manager** means any person or entity who manages real property, including leasing space, collecting rents, selecting tenants, and arranging for repair, renovation or maintenance by others of building or grounds, provided that the repair, renovation or maintenance of building or grounds is not performed by any Insured.

An addendum to a listing agreement that briefly lists extra services that will be provided during the term of the agreement is inadequate. Such a document is incomplete because it does not state **what is not being undertaken by the real estate professional**. The lack of a clear agreement will lead to misunderstandings and is the quickest path to being served with a lawsuit.

#### **SECOND, OBTAIN INSURANCE.**

Be sure that the agreement between you and your client requires that they name you as an additional insured under their policy, and follow up with a request for a certificate of insurance confirming the same. **Caution:** a certificate of insurance showing that the client/seller has the necessary insurance coverage for the property but does not specifically list you as an additional insured is insufficient.

Insist on the client/seller having a specific endorsement issued for their policy to name you as an additional insured and produce a certificate of insurance so stating. Unsophisticated property owners, and even condominium association boards, may believe they are complying with your request regarding insurance by having their agent send you a certification of their coverage, which may include coverage for employees and anyone they enter into an agreement with, but, more likely than not, consider you to be an independent contractor not covered by the general policy.

### **THIRD, INSURANCE FOR VENDORS.**

If you have agreed to provide maintenance and repair services for a property and are required to hire lawn care and building maintenance contractors, verify that those individuals and companies have necessary automobile, equipment and general liability coverage. While such contractors may be independent contractors for you, if you retain their services and send them to a property and the work they perform results in injury to others, you will be named in the resulting lawsuit.

### **FOURTH, IMPLEMENT A RISK CONTROL PLAN.**

If you have assumed responsibility for management of a property, you should inspect the property in order to identify known risks or exposure, such as an unfenced pool, playground equipment in disrepair or an unsecured vacant building. Document the need for maintenance, repair and conditions posing unnecessary risks in writing. Present the list to the property owner and request authorization to remedy the conditions. If the owner will not authorize the requested maintenance, confirm in writing and continue to remind the client about the issue on a regular basis.

### **FIFTH, ENGAGE EXPERTS.**

What at first appears to be a simple undertaking can easily become a more complex task as you develop a specific plan for how to implement **one** through **four** above. If it is a legal issue, consult a lawyer. If it is an insurance or property loss issue, engage the insurance agent. If there is a construction defect or deterioration of a building issue, engage an inspector or structural engineer. By seeking qualified expert advice, you can drastically reduce exposure from unintended consequences of the undertaking.

### **CONCLUSION.**

By understanding and being aware of the scope of service you offer to a client and taking appropriate steps to avoid the attendant risk, you can effectively avoid unintended consequences that may lead to litigation.

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### Pre-Claim Assistance

#### ***How Real Estate Professionals Can Effectively Manage Potential Claims***

Effective management of claims involving real estate professionals starts with early notification of potential claims. When a client notifies the insurance provider of a claim or potential claim *early in the process*, the likelihood of the claim being effectively resolved with a positive outcome is significantly increased. The claim generally is resolved in less time, with reduced aggravation and fewer dollars. The insured and the insurance provider also benefit because early notification and quick resolution can mean decreased expenses and better settlements.

#### **Situations that benefit from a pre-claim assistance program**

Travelers, recognizing the benefits of early notification of a potential claim, offers a pre-claim assistance program for real estate professionals to help them manage claims more effectively. The benefits of the program are not only in terms of time and money. By offering this program, we are reinforcing our commitment to long-term relationship with our real estate professional policyholders.

Following are some typical instances where our pre-claim assistance program can help:

- Requests for you or your agent's deposition as a non-party witness
- Subpoena of your records
- Any disputes you are aware of between the buyer and seller
- Threatening letters or verbal communications from your client or their attorney without a monetary demand being made
- Requests for information and/or a copy of your file
- A situation in which you are aware of an error that you made, even though there has been no claim at this time

#### **The Pre-Claim Assistance Process**

As part of the pre-claim assistance process, Travelers claim executives will work with you to gather and assess the facts in an attempt to manage the investigation and disposition of the potential claim.

Our assessment activities include attempts to:

- Gather all known facts related to the potential claim
- Identify each person allegedly involved in or affected by the potential claim
- Identify how and when you first became aware of the potential claim, and
- Understanding the reasons for anticipating a claim

As part of the pre-claim expenses for a potential claim, we also help manage the legal counsel and

experts. This includes:

- Depending on the potential claim, paying reasonable fees, costs and expenses incurred by us for the investigation (attorney and experts on your behalf) of a potential claim.

Under the terms of pre-claim assistance in your policy, pre-claim reasonable fees, costs and expenses incurred by us for the investigation of a potential claim do not apply to your deductible or policy limit. Another advantage of the pre-claim assistance process is that once you have reported the potential claim to Travelers, coverage is positioned to respond to any subsequent claim that may arise out of the potential claim situation.

When confronted with a pre-claim situation, prudent real estate professionals know the benefits of early potential claim notification. If you encounter a potential claim, remember to take advantage of our pre-claim assistance program – designed especially for you.

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