

LAMBERT V. CARNEGHI:

**THE EXPERT WITNESS AND PROFESSIONAL
LIABILITY**

PRESENTED BY

STEPHEN T. CROSSON, MAI, SRA, FRICS

GENERAL OBSERVATIONS

- COMMENTS REFLECT THOSE OF APPRAISER
 - I AM NOT AN ATTORNEY
- CASES CITED IN PRESENTATION ARE ILLUSTRATIVE, NOT EXHAUSTIVE
- EXPERT WITNESSES ARE ALMOST ALWAYS IMMUNE FROM SUITS BY ADVERSE PARTIES
 - RATIONALE FOR LITIGATION PRIVILEGE AND WITNESS IMMUNITY
 - TO ENCOURAGE FRANK, TRUTHFUL TESTIMONY
 - TO DISCOURAGE INTIMIDATION BY HOSTILE PARTIES
 - TO AVOID FLOOD OF SUITS ALLEGING INJURY BY ADVERSE PARTIES

- **TREND TOWARD PERMITTING RETAINING PARTIES TO SUE THEIR EXPERT WITNESSES FOR NEGLIGENCE**

- IN ORDER TO PREVAIL, PLAINTIFF MUST PROVE THAT IT WOULD HAVE WON ITS ACTION BUT FOR THE EXPERT'S NEGLIGENCE
 - VERY DIFFICULT TO PROVE ("TRIAL WITHIN A TRIAL" REQUIREMENT)
 - TRIAL OF EXPERT WITHIN TRIAL ITSELF
 - CAN ONLY BE HELD LIABLE FOR ACTUAL HARM CAUSED (*MATTCO FORGE V. ARTHUR YOUNG & CO.*)
- TRIAL JUDGES MAY HAVE POWER TO IMPOSE MONETARY SANCTIONS UPON *EXPERTS WHOSE TESTIMONY THE COURT DEEMS MISLEADING AND FALSE* (*WOJCICKI V. CARAGHER*)
 - JUDGES HAVE HEARD ENOUGH OF "JUNK" EXPERT TESTIMONY
 - REASON FOR DAUBERT
- EXPERT WHO CHANGES HIS/HER OPINION CANNOT BE SUED BY FRIENDLY PARTY, GIVEN THAT THE EXPERT HAS DUTY TO TESTIFY TRUTHFULLY (*PANITZ V. BEHREND*)
 - EXPERT MAY CHANGE OPINIONS BASED UPON, FOR EXAMPLE
 - PREVIOUSLY UNKNOWN FACTS
 - DISCOVERY OF ERROR IN FORMATION OF OPINIONS

LAMBERT V. CARNEIGHI

- PLAINTIFF'S (LAMBERTS') HOME IN CALIFORNIA WAS TOTALLY DESTROYED BY FIRE
- FIRE INSURANCE POLICY PROVIDED "GUARANTEED REPLACEMENT COST COVERAGE" AS WELL AS "BUILDING ORDINANCE OR LAW COVERAGE"
- PLAINTIFFS AND INSURER UNABLE TO AGREE UPON REPLACEMENT COST
- CALIFORNIA INSURANCE CODE STATES THAT EACH PARTY SHALL DESIGNATE AN APPRAISER AND THAT APPRAISERS SHALL SELECT A DISINTERESTED UMPIRE
 - PLAINTIFFS HIRED DAILEY AS AN EXPERT "TO DEFINE, DESCRIBE AND ESTIMATE THE *REPLACEMENT COST*" OF THE HOME FOR THE APPRAISAL PROCESS
 - PLAINTIFFS ALSO HIRED CARNEIGHI AS AN EXPERT "TO PROVIDE APPRAISAL SERVICES....AND TO BE THEIR ADVOCATE IN THE APPRAISAL PROCESS...."

- PLAINTIFFS SUBSEQUENTLY SUED BOTH DAILEY AND CARNEGHI IN CONNECTION WITH THE ALLEGEDLY FLAWED APPRAISAL PROCESS, I.E., ALLEGED NEGLIGENCE
- TRIAL COURT FOUND FOR THE DEFENDANTS, E.G., THAT DAILEY WAS IMMUNE FROM SUIT UNDER THE LITIGATION PRIVILEGE AND THAT CARNEGHI WAS IMMUNE AS AN ARBITRATOR
- THE LAMBERTS APPEALED TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO (JANUARY 11, 2008)
 - APPELANTS (LAMBERTS) ARGUED THAT
 - CARNEGHI WAS NOT SUBJECT TO LITIGATION IMMUNITY AS HE WAS A PARTY-APPOINTED ADVOCATE
 - DAILEY SHOULD NOT BE GIVEN IMMUNITY SINCE HE WAS NOT AN ADVERSE WITNESS
 - UNDER CALIFORNIA INSURANCE CODE SECTION 1027, AN APPRAISAL SERVES AS A DE FACTO ARBITRATION

- **FINDINGS OF APPEALS COURT**

- CARNEGHI, IN HIS COURT-DETERMINED ROLE AS ARBITRATOR, COULD NOT BE HELD LIABLE FOR NEGLIGENCE (ARBITRAL IMMUNITY)
- DAILEY COULD BE HELD LIABLE AS HE WAS NOT ENTITLED TO THE LIGITATION PRIVILEGE, I.E., THAT THE PLAINTIFFS COULD SUE THEIR OWN EXPERT WITNESS

RISK MANAGEMENT BY VALUATION EXPERT WITNESSES

- TESTIFY TRUTHFULLY – NOT ONLY REQUIRED BY LAW BUT WILL RESULT IN MOST CONVINCING TESTIMONY
- BE WELL-PREPARED, CAREFUL AND COMPETENT
 - NO SUBSTITUTE FOR PREPARATION
- APPEAR AS AGREED (CONTRACTUAL OBLIGATION)
 - SHOW UP – CLIENT AND COUNSEL RELY ON EXPERTS
- MAINTAIN E&O INSURANCE
- BE FULLY KNOWLEDGEABLE OF USPAP
- BE KNOWLEDGEABLE OF DAUBERT TESTS OF ADMISSIBILITY OF TESTIMONY
- DO NOT DESTROY, MISPLACE OR LOSE EVIDENCE
 - DEVELOP FIRM POLICY FOR DOCUMENT RETENTION
- AVOID BEING “AGREED UPON” EXPERT BY ALL PARTIES TO LITIGATION (MAY LOSE ADVERSIAL IMMUNITY)
- CAREFULLY CONSIDER SUING RETAINING COUNSEL FOR UNPAID FEES-RISK OF COUNTERSUIT; LOGICAL DEFENSE IN SUCH A SITUATION
- COURT-APPOINTED EXPERTS ENJOY QUASI-JUDICIAL IMMUNITY
 - GOOD SITUATION FOR EXPERTS
- AVOID CONFLICTS OF INTERESTS
 - CONFLICT CHECK SHOULD BE DONE PRIOR TO ENGAGEMENT
- SEEK LEGAL COUNSEL IN DRAFTING CONTRACTUAL LANGUAGE IN ENGAGEMENT LETTER TO REDUCE OR ELIMINATE POTENTIAL LIABILITY FROM SUIT BY FRIENDLY PARTY
 - VERY IMPORTANT
- BE DISCERNING AS TO WHICH ATTORNEYS YOU WORK FOR
 - POOR JOB BY ATTORNEY CAN REFLECT UNFAVORABLY UPON EXPERT

SOURCE MATERIAL

- THE A-Z GUIDE TO EXPERT WITNESSING (BABITSKY, MANGRAVITI, AND BABITSKY)
- OPINION OF COURT OF APPEAL