



Mortgage Fraud Recoupment: Procedural Requirements and Issues Relating to Insurance, Bonds & Contractual Indemnities

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Overview

- Insurance
- Bonds
- Contractual Indemnity

Insurance: Types & Coverages

- Types of Policies
- Coverages
- Exceptions
- Exclusions

Insurance: Tender

- To Whom
- By Who
- Mode of Transmission
- Contents
- When

Insurance: Tender Response Obligations of Carrier

- Acknowledgment
- Investigation
- Substantive Response
- CA: Fair Claims Settlement Practice Regs
(10 Cal. Code Regs § 2695.1-2695.14)

Insurance: Claim Investigation By Carrier

Duty to Cooperate

- Tensions: Customer Privacy, Privileges; etc.
- Proof of Loss
- Declarations
- Examinations Under Oath
- File Review

Require carrier to distinguish between investigation and defense.

Insurance: Coverage Decision by Carrier

4 Options:

- Denial
- Acceptance without Reservation of Rights (RofR)
- Acceptance with RofR
- Defense Agreement without Comment on Coverage

Partial Waiver

Insurance: Carrier's Rights If Coverage Exists

- Eliminate Risk
- Pay Loss (up to lesser of policy limits or FMV)
- Purchase Insured's Loan
- Defend (or Prosecute) Action to Establish Title

Insurance: Scope of Defense

- Duty to defend broader than duty to indemnify
- Must defend all causes of action provided at least one is “potentially covered.”
- If unsure, carrier may file declaratory relief action

Insurance: Selection of Defense Counsel

General Rule:

- Carrier's panel defense counsel

Exceptions:

- Separate Panel Counsel (Multiple Competitive Insureds)
- Independent Counsel
 - Mixed Interests
 - Waived if not asserted by Insured
 - San Diego Navy Fed CU v. CUMIS Ins. Soc. (1984) 162 Cal.App.3d 258; Cal. Civ. C. §2860

Insurance: Selection of Defense Counsel > Independent Counsel (Cont'd.)

Factors (for determining right to Independent Counsel):

- Counsel can control coverage
- Carrier and insured adversarial in separate action
- Carrier insured adversary
- Counsel representing multiple competitive parties
- Dueling interests (case-by-case examination)

Insurance: Selection of Defense Counsel > Independent Counsel (Cont'd.)

Non-factors:

- Damages sought exceed policy limits
- Mere RofR
- Carrier refusal to assert certain affirmative defenses
- Carrier refusal to prosecute cross-action
- Buss reimbursement rights
- Lender insured can always associate in own counsel

Insurance: Carrier's Reimbursement Rights

- “Duty to Defend” broader than “Duty to Indemnify”
- So long as one COA “potential” covered, all COAs must be defended
- Therefore, carrier has reimbursement rights
 - Buss v. Sup. Ct. (1997) 16 C.4th 35
 - Waived if not in policy or separate RofR
 - Attaches to each COA not “potentially” covered

Insurance: Carrier's Defense of Case

- Carrier's right to defend ends if and when defenses prove futile
- Then, must honor obligation for realized insured risk

Bonds

- Types
- Differences with Insurance
- Tendering, Enforcing, etc.

Contractual Indemnity Agreements: Counterparties & Coverage

- Counterparties
 - Loan Brokers
 - Loan Correspondents
 - Review Appraisers
 - All Contracted Vendors

Contractual Indemnity Agreements: Coverage

- Sample:

“Indemnification. To the fullest extent permitted by law, Vendor shall defend, indemnify, and hold harmless Company and any agents, heirs, successors, assigns, or employees from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from this Agreement, but only to the extent caused in whole or in part by negligent acts or omissions or willful misconduct of the Vendor, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described herein.”

Questions

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