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Banking on Insurance

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Preventing lender liability claims

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Financial institutions have an important responsibility in the communities they serve. Whether it's providing loans for a home mortgage or financing a construction project, financial institutions in many ways are the underpinnings of economic activity. This makes it critical for these organizations to make sure they are stable and able to address their exposures, especially when it comes to counterclaims that borrowers could file against them. To avoid counterclaims, financial institutions can benefit from changing their mindsets from simply credit lenders to lender liability monitors. Lender liability counterclaims arise from risks during the various phases of the loan process: (1) proposal and negotiation; (2) due diligence and underwriting; (3) loan approval and commitment; (4) documentation and closing, and (5) foreclosure. Lenders can limit their liability throughout this process by understanding exposures and implementing corresponding risk mitigation tactics.

Proposal & Negotiation

During the first phase of a loan, verbal promises and representations regarding loan terms and conditions create opportunities for a breach of contract by the lender. Because not all jurisdictions require that contracts be in writing, verbal negotiations and contracts are legally acceptable, though they create significant exposures. It is critical to coordinate with each of the various lender departments involved to ensure that the lender is aware of all oral representations made to a borrower by any lender representative.

Due Diligence & Underwriting

In a counterclaim arising out of alleged misconduct during the initial extension of credit, the borrower may allege that the lender's advice included misrepresentations concerning the profitability of a company or investment, or the credibility of a third party. The borrower may contend that the lender should have known that the terms of the loan would cause default or financial distress and should not have made the loan. The borrower may also assert that the lender verbally misrepresented the terms of the loan. These claims underscore the importance of thoroughly completing due diligence and properly underwriting loan terms.

Coordination between all loan departments is equally as important in the due diligence and underwriting phase. The financial institution must consider who has interacted with

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Inside

OSHA revises reporting rule for worker injuries

Insurance Journal

The U.S. Occupational Safety and Health Administration (OSHA) has issued a final rule requiring employers to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation or loss of an eye.

Under the revised severe injury rule, employers will be required to notify OSHA of work-related fatalities within eight hours, and work-related in-patient hospitalizations, amputations or losses of an eye within 24 hours.

The rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, will go into effect on Jan. 1, 2015, for workplaces under federal OSHA jurisdiction. The new rule maintains the exemption for any employer with 10 or fewer employees, regardless of their industry classification, from the requirement to routinely keep records of worker injuries and illnesses.

All employers covered by the Occupational Safety and Health Act, even those exempt from maintaining injury and illness records, are required to comply with OSHA's new severe injury and illness reporting requirements. To assist employers, OSHA said it is developing a web portal for employers to report incidents electronically, in addition to the phone reporting options.

"Hospitalizations and amputations are sentinel events, indicating that serious hazards are likely to be present at a workplace and that an intervention is warranted to protect the other workers at the establishment," said Dr. David Michaels, Assistant Secretary of Labor for OSHA.

"Workplace injuries and fatalities are absolutely preventable, and these new requirements will help OSHA focus its resources and hold employers accountable for preventing them," said U.S. Secretary of Labor Thomas E. Perez, citing Bureau of Labor Statistics that 4,405 workers were killed on the job in 2013.

In addition to the new reporting requirements, OSHA has also updated the list of industries that, due to relatively low occupational injury and illness rates, are exempt from the requirement to routinely keep injury and illness records. The new list is based on updated injury and illness data from the Bureau of Labor Statistics. Any employer with 10 or fewer employees, regardless of their industry classification, is exempt from the record-keeping rule. ■

Top 5 reasons you need cyberrisk coverage

1. Data breaches and cyber-attacks are becoming more common and have increased 42 percent in the last year alone.
2. 40 percent of all breaches have occurred in organizations of 1,000 or fewer employees and 31 percent in organizations of fewer than 100 employees.
3. All industries are vulnerable to a data breach or cyber-attack, including education, financial services, nonprofits, professional services, and manufacturing, hospitality and retail sectors.
4. The average cost of a data breach has risen to $5.4 million and includes costs related to business disruption, revenue loss, equipment damages, legal fees, public relations expenses, forensic analysis and notification costs that are legally mandated in 47 states.
5. The average costs associated with a breach are $188 per compromised record.

If you need more information on cyber coverage please email us at insurance@texasbankers.com or call 800-318-4142. ■

Winter weather safety tips and reminders

Each year as cold weather comes rolling in, we experience claims that have weather related causes.

Here are some helpful reminders to keep you, your employees and clients safe:

- Wrap exposed pipes.
- Be sure sidewalks and parking areas are free from slippery ice.
- Turn off landscaping sprinkler systems.
- Prepare automatic fire sprinkler systems for cold weather.
- Be sure to maintain heat in buildings after hours.
- Be sure to monitor any ORE properties. If heat utilities are turned off, make sure pipes are drained and protected. Insurance claims can be denied if property is not maintained.
- If you are in an area that has heavy snowfall, monitor snow accumulation on roofs and canopies and remove snow if the weight reaches a critical level.
- Encourage employees to wear the right shoes in icy weather to prevent slips and falls.
- Consider having a generator and fuel for power outages.
- Maintain bank vehicles for cold weather by checking batteries, fluids and tires.
- If your drive to work is a lengthy commute, have a personal emergency kit in your vehicle. If stranded, blankets, water, snacks, flashlights and a portable way to charge your cell phone will be needed. Consider keeping warm boots, heavy gloves and coats in your vehicle, too.
- Revisit driving tips for icy weather. ■

Preventing lender liability claims

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the borrower and obligors and who has helped with the due diligence and underwriting process. This includes lenders, business development officers, the credit department, the due diligence department and loan administration. A borrower asserting a counterclaim relating to the servicing of the loan may allege that the lender breached the terms of the loan agreement if all departments are not aligned.

Loan Approval & Commitment

In the loan approval and commitment phase, loan proposal letters, instead of loan commitment letters, should be used to create a mutual understanding between lender representatives and obligors. Understanding the use of attorney-prepared documents and/or legal forms is a critical component of the documentation and closing phase.

Working with an attorney can help ensure that each party is on the same page and to make sure that the appropriate loan document provisions are included in the loan contract in order to mitigate risks. Here are several examples of provisions that should be considered when preparing a loan contract:

- Events of Default: Loan documents must include clear and consistent provisions defining what constitutes an event of default.
- Remedies: A proper remedies provision should include clear and consistent remedies and identify clear and consistent cure periods.
- Modifications in Writing: A provision should be included in the loan contract indicating that no change in terms to the loan documents will be effective without a signed writing evidencing the change.
- Loan Assignability/Participation: The loan contract should include a provision outlining the details of the lender's ability to assign its interest in the loan, to sell participation in the loan and to disclose the borrower's financial information.
- Joint Drafting: A provision should be included in the loan contract that indicates that no single party shall be determined to be the drafter of the workout agreement.
- Application of Payment: The loan contract should include a clear and accurate provision detailing the application of payments.
- Merger Clause: The loan contract should include a merger clause declaring that the contract is complete and is a final agreement between involved parties.

Foreclosure

In the loan approval and commitment phase, loan proposal letters, instead of loan commitment letters, should be used to create a mutual understanding between lender representatives and obligors. Understanding the use of attorney-prepared documents and/or legal forms is a critical component of the documentation and closing phase.

While counterclaims in the lender liability process can't always be prevented, being hyper vigilant regarding exposures to such claims can significantly help lenders prevent them. By understanding the phases of the loan process and the involvement of the departments involved in each of the phases of the loan process, exposures can be better identified and smart risk management tactics instituted. While the above mentioned proactive measures can certainly help limit exposure to certain lender liabilities, it is also important to have the proper defense counsel and insurance coverage options selected to help shoulder the burden and ensure that those instances are handled as smoothly as possible. ■

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We work for you!

Texas Bankers Insurance Agency is proud to say we have served the banking community for over 25 years. We have been blessed to work with great bankers and currently insure over 200 banks nationwide. We provide a wide variety of insurance products but we also educate our clients and keep them abreast of the latest insurance issues and claims trends. But our agency does much more than sell insurance.

On occasion, we hear from bankers that their insurance agent is a bank customer, a board member or a close friend. So buying insurance coverage from Texas Bankers Insurance Agency may not be an option. We do understand the value of these situations. However, we can be a resource for your bank and help preserve your local business relationships through our consulting services.

Here are a few of the fee-based consulting services we can offer:

- Review all insurance policies and advise you of any restrictive policy language or missing coverage.
- Review insurance losses and offer risk control help to reduce premium hikes.
- Inspect locations for property, liability or workers compensation claim issues.
- Educate staff on the proper way to complete insurance applications, how to report changes to coverage or report claims.
- Provide insurance checklists with helpful insurance tips that protect your bank.
- Provide RFP (request for production services). We can take on your insurance application process, assign insurance agents, review proposals and provide input. We can help implement your new insurance program into the bank.
- Insurance presentations for your board of directors meetings. Our presentation includes coverage discussions, hot topics in the banking industry and where the insurance claims are occurring in Texas and nationwide.
- Hold insurance educational seminars. These can be done by phone, webinar or on site.

We hope the next time your insurance coverage is up for renewal, you will consider calling our agency experts. We will help you get the proper insurance coverage at a fair price. For more information call our agency at 800-318-4142 or email insurance@texasbankers.com. ■

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