

## Lender Liability: Is Your Coverage Sufficient?

The old saying is true—you really don't know how good your insurance coverage is until you actually need it. The economic downturn and resulting rise in foreclosure rates has prompted many bankers to analyze their Lender Liability coverage to ensure they have adequate protection. Lender Liability—that's primarily what the bankers' errors and omissions policy covers, right? Well, theoretically yes, but you may not have the coverage you think you do. There are actually vast coverage differences from one insurance carrier to another, and you don't want to learn about "the fine print" when you put your carrier on notice of a claim. Here are a few tips for assessing whether your Lender Liability coverage makes the grade:

**Lending Discrimination.** While it is against public policy to insure against intentional acts of discrimination, it is important to remember that many Lender Liability claims allege discrimination in some way, shape, or form even if there was no biased intent on the part of the bank. When comparing policies:

- Review the Bodily Injury Exclusion to ensure that "discrimination" is not listed;
- Look for direct exclusionary language in the form of a "Lending Discrimination Exclusion;" and
- Request a positive affirmation that defense costs will be covered for allegations of discrimination.

**Progressive's policy does not contain any type of Lending Discrimination Exclusion and defense costs are expressly covered.**

**Lending Law Violations.** Virtually all Lender Liability claims allege that the bank violated federal or state lending laws. While all policies exclude intentional or willful violations of law, some policies further restrict coverage by adding a "Lending Law Violation Exclusion."

The Lending Law Violation Exclusion can be particularly problematic as the policy would exclude claims (including defense costs) "arising out of or attributable to *any violation* of federal or state lending laws or regulations" (e.g., Truth-in-Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, The Homeowners Equity Protection Act, etc.). Exclusions pertaining to specific lending laws can be onerous given that there is no intent or willful act required for the exclusion to be implicated. For example, this type of exclusion would bar class action lawsuits alleging lending discrimination, improper disclosure of information, etc.

**Progressive has no additional exclusionary language pertaining to specific lending law violations, making our Lender Liability coverage one of the broadest available at this time.**

**Insider Loans.** Following the savings and loan crisis, insurance carriers promptly began adding Insider Loan Exclusions to their policies. This type of exclusion can be troublesome from the community bank perspective for two reasons:

- First, the definition of "insider" can vary drastically between carriers. Some limit "insiders" to directors and officers, while others expand the definition to include employees, and still others take it even *further* by excluding loans to shareholders. Look for direct exclusionary language, but also be sure to review the definition of "Insider," "Lending Customer," or "Borrower." Don't forget that exclusions are often hidden in policy definitions. One of the most restrictive definitions defines borrower as "any person or entity that is not directly or indirectly affiliated with the Company *in any respect*."
- Second, community banks in general, and de novo banks in particular, often rely heavily on board members, officers, employees and other "insiders" to help promote the bank and generate loans within the community.

**Progressive understands the needs of community banks and, as one of the top writers of de novo banks in the industry, our policy does not have an Insider Loan Exclusion.**

**Loan Participations and Loan Servicing.** If your institution buys or sells loan participations or services loans for others, be sure to confirm that these activities are covered.

- Some policies only cover "loans made by the Company;" if you are sued because of negligence in your capacity as a loan servicer (either by the borrower, the originating bank, or another third party), you may not be protected.
- In addition, some carriers only cover loans if the bank has an ownership interest. Again, review not only the exclusions, but also key definitions which may contain exclusionary language.

**Progressive's policy includes protection for loan participations, first-party loan servicing, and third-party loan servicing.**

**Other Considerations.** Many carriers significantly restrict Lender Liability coverage by only covering "suits brought by or on behalf of a borrower." We call this "Lender Liability-Lite." Be sure your Lender Liability coverage will respond to suits brought by third parties such as, contractors, guarantors, other financial institutions, etc. (*approximately one-third of Progressive's paid Lender Liability claims are brought by individuals or entities other than the borrower*).

**Progressive's Broad Form Company Liability and Broad Form Lender Liability coverages include the most comprehensive lender protection in today's market. We Know Community Banks—do not hesitate to call us so we can help you structure your coverage appropriately.**