

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

U.S. Bancorp and U.S. Bank National
Association,

Court File No.: _____

Plaintiffs,

COMPLAINT

v.

Jury Trial Demanded

Federal Insurance Company,

Defendant.

Plaintiffs, U.S. Bancorp and U.S. Bank National Association, for their Complaint against Defendant, Federal Insurance Company, state and allege as follows:

The Parties

1. U.S. Bancorp is a Delaware corporation with its principal place of business located in Minneapolis, Minnesota.

2. U.S. Bank National Association is a federally chartered bank with its principal place of business in Minneapolis, Minnesota, and is a wholly-owned subsidiary of U.S. Bancorp, which also has its principal place of business in Minneapolis, Minnesota (collectively, “U.S. Bank”)

3. Federal Insurance Company (“Federal”) is an Indiana corporation with its principal place of business located in Indianapolis, Indiana. Federal is authorized to do business and does business in the State of Minnesota.

Nature of the Action

4. This action involves a dispute regarding the insurance coverage available to U.S. Bank with respect to numerous past and pending lawsuits against U.S. Bank involving its role as trustee for various trusts holding interests in residential mortgage backed securities. These lawsuits (the “RMBS Litigation”) include, but are not limited to, the lawsuits titled *Blackrock Balanced Capital Portfolio, et. al. v. U.S. Bank National Association*, Index No. 652204/2015 (“*Blackrock*”) and *Royal Park Investments SA/NV v. U.S. Bank National Association*, 1:14-cv-02590-vm-RWL (“*Royal Park*”).

Jurisdiction and Venue

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 based on diversity of citizenship of the parties. The amount in controversy exceeds \$75,000. Venue is proper pursuant to 28 U.S.C. § 1391.

The Insurance Policies

6. U.S. Bancorp is the named insured under an excess policy of insurance issued by Federal Insurance Company, Policy Number 8212-0443, in force from August 1, 2011 to August 1, 2012. U.S. Bank National Association, as a wholly owned subsidiary, is an insured under the Federal Policy. A true and correct copy of the Federal Policy is attached as Exhibit A.

7. The Federal Policy provides a \$10 million limit of liability which is part of a \$20 million limit of liability in excess of \$55 million in underlying insurance (the “Underlying Limits”). The underlying insurance policies include a primary policy issued

by Indian Harbor Insurance Company, an excess policy issued by ACE American Insurance Company and an excess policy issued by U.S. Specialty Insurance Company.

8. The Federal Policy generally follows-form to the underlying primary policy issued by Indian Harbor Insurance Company (the “Followed Policy”). A true and correct copy of the Followed Policy is attached as Exhibit B.

9. Pursuant to the **Insuring Clause** of the Followed Policy, Federal agreed:

To pay on behalf of the **Insureds Loss** which the **Insureds** shall become legally obligated to pay as a result of any **Claim** first made against the **Insureds** during the **Policy Period** arising out of any **Wrongful Act** committed by the **Insureds** . . . while performing **Professional Services** including failure to perform **Professional Services**.

10. The term **Claim** includes “a civil proceeding commenced by the service of a complaint or similar pleading.”

11. **Loss** is defined, in relevant part, as:

[T]he total amount which any **Insured** becomes legally obligated to pay on account of each **Claim** . . . against the **Insureds** for **Wrongful Acts** for which coverage applies, including but not limited to, damages, judgments, settlements, costs, pre-judgment and post-judgment interest and **Defense Costs**. **Loss** does not include: *

4) amounts otherwise reimbursable to the **Insureds** by the trust, estate, plan or fund and/or any similar entity and/or the sponsor of any trust, estate, plan or fund and/or any similar entity.

12. **Defense Costs** means:

[T]hat part of **Loss** consisting of reasonable costs, charges, fees (including but not limited to attorneys’ fees and experts’ fees) and expenses . . . incurred in defending or investigating **Claims** . . .

13. The term **Professional Services** means:

[S]ervices allowed under the laws governing services by the **Insured** and performed, required to be performed, or failed to be performed by the **Insureds** . . . for the benefit of, or on behalf of a customer or prospective customer of the **Insureds** (a) for a fee, commission or other consideration * * *

14. The Followed Policy further provides:

No **Insured** may . . . admit liability for, make any settlement offer with respect to, or settle any **Claim** without the Insurer's consent, such consent not to be unreasonably withheld.

15. The Followed Policy also contains an Assistance, Cooperation and Subrogation provision, which provides:

a. The **Insured** agrees to provide the Insurer with all information, assistance and cooperation that the Insurer may reasonably request, and further agree that they will do nothing which in any way increases the Insurer's exposure under this Policy or in any way prejudices the Insurer's potential or actual rights of recovery.

b. In the event of any payment under this Policy, the Insurer shall be subrogated to all of the potential or actual rights of recovery of the **Insured**. . . .

General Allegations Re: RMBS Litigation

16. U.S. Bank is named as a defendant in the RMBS Litigation.

17. The plaintiffs in the RMBS Litigation allege, among other things, that U.S. Bank breached its obligations as trustee under various trust agreements by, among other things, purportedly ignoring deficiencies in the loan pools and failing to take action to protect the trusts. Plaintiffs specifically allege that U.S. Bank breached its obligation to exercise its duties as a prudent person would under the circumstances, and that it otherwise performed its duties under the trust agreements (or other governing agreements) negligently.

18. The trust agreements at issue in the RMBS Litigation (including but not limited to those at issue in *BlackRock* and *Royal Park*), subject to their other terms, conditions and limitations, include indemnity provisions that allow U.S. Bank to be indemnified from trust assets except where U.S. Bank has incurred loss (including legal fees and expenses) by reason of negligence or other wrongdoing.

19. Notwithstanding the indemnification for **Defense Costs** received from the trusts, a portion of the **Defense Costs** incurred in the RMBS Litigation have not been and will not be reimbursed by the trusts for various reasons (the “Unreimbursed Defense Costs”).

20. Many of the plaintiffs in the RMBS Litigation are current certificateholders in one or more of the trusts and have a financial interest in preventing U.S. Bank from using trust assets to finance its legal fees and expenses or any judgment or settlements. Current certificateholders generally oppose (and have opposed) using trust assets to indemnify U.S. Bank and generally have contended that the trusts would not have to indemnify any settlement reached with or judgment against U.S. Bank.

21. In evaluating its potential liability exposure in, and whether to settle, any of the RMBS litigation, including *BlackRock* and *Royal Park*, U.S. Bank must (and did) consider its indemnity rights in the event of any adverse judgment. The value of its indemnity rights from the trusts is just one of many factors U.S. Bank must consider as part of determining whether to compromise or litigate (or continue to litigate) any claim in the RMBS Litigation, including but not limited to the inherent unpredictability of the possible outcomes of any trial.

The Blackrock Case Settles with Federal's Express Written Consent

22. U.S. Bank timely informed Federal and its other insurers of the settlement discussions in the *Blackrock* case before agreeing to and consummating any settlement. Federal expressly consented to the settlement of the *Blackrock* case and informed U.S. Bank in writing that “[Federal] does not object to the Bank foregoing its indemnification rights as against the income stream and/or assets of the trusts that are the subject of the Blackrock litigation, as we understand this is an essential term of the plaintiffs’ agreement to settlement.”

23. U.S. Bank ultimately settled the *Blackrock* case. As Federal knew, the terms of the settlement included U.S. Bank’s agreement with the plaintiffs, which included current certificateholders in the applicable trusts, that the funds from the settlement were to come from U.S. Bank (and not from the trusts). Accordingly, the settlement payment is not an “amount[] otherwise reimbursable to the **Insureds** by the trust, estate, plan or fund and/or any similar entity and/or the sponsor of any trust, estate, plan or fund and/or any similar entity.”

24. U.S. Bank’s decision to enter into the *Blackrock* settlement was reasonable and prudent.

Federal Denies Coverage for the RMBS Litigation

25. Federal has taken the position that all Unreimbursed Defense Costs and settlements arising from the RMBS Litigation did not involve any claims for **Loss** because of U.S. Bank’s purported legal entitlement to indemnity from the various trusts, and that

any agreement to forego indemnification rights from the trusts would constitute a breach of U.S. Bank's obligations under the Federal Policy.

The *Royal Park* Case Settles after Federal Denies Coverage

26. Unlike in *Blackrock*, the plaintiffs in *Royal Park* were not current certificateholders in the relevant trusts.

27. U.S. Bank informed Federal and its other insurers of the settlement discussions in the *Royal Park*. Federal denied coverage for any eventual settlement of *Royal Park*.

28. U.S. Bank settled the *Royal Park* case. Unlike the *Blackrock* settlement, the terms of the settlement do not expressly include U.S. Bank's agreement to forego any potential claim for indemnity for the settlement payment from the trusts.

29. On information and belief, certain certificateholders would contest any claim for indemnification of the *Royal Park* settlement. U.S. Bank has therefore determined that the pursuit of any indemnification rights for the *Royal Park* settlement would not be in the best interests of U.S. Bank, taking into account the risks and costs of litigating that issue.

30. U.S. Bank's decision to enter into the *Royal Park* settlement was reasonable and prudent.

31. The Underlying Limits have been exhausted by the payment of covered **Loss**, including **Defense Costs** incurred in the RMBS Litigation.

32. U.S. Bank remains a party in other cases in the RMBS Litigation and it has or will have opportunities to resolve other claims and lawsuits and there now exists an actual, substantial and justiciable controversy concerning the rights and obligations of the

parties under the Federal Policy capable of resolution by this Court regarding coverage for the RMBS Litigation including *Blackrock* and *Royal Park*.

FIRST CAUSE OF ACTION

Breach of Contract – Refusal to Cover the *Blackrock* Settlement

33. U.S. Bank repeats and realleges all the preceding paragraphs of the Complaint as if fully set forth herein.

34. The *Blackrock* settlement constitutes unreimbursed **Loss**, and that **Loss** is covered under the terms of the **Insuring Clause**.

35. U.S. Bank has satisfied all conditions precedent to coverage with respect to the *Blackrock* settlement. In particular, (a) U.S. Bank provided timely notice of the *Blackrock* case; (b) it provided Federal with all information, assistance and cooperation that Federal could reasonably request, (c) it did nothing to increase Federal's exposure under the Policy; and (d) it obtained Federal's consent to the *Blackrock* settlement and specifically obtained its consent to agree not to pursue indemnification rights against the relevant trust(s).

36. No exclusion in the Followed Policy or the Federal Policy bars coverage for the *Blackrock* settlement.

37. Federal has refused to reimburse U.S. Bank for the *Blackrock* settlement. Federal thereby has breached its obligations under the Federal Policy.

38. By reason of the foregoing, Federal is liable to U.S. Bank for damages, the exact amount to be proven at trial, including, but not limited to, the portion of the *Blackrock*

settlement covered under the Federal Policy; consequential damages; pre-judgment and post-judgment interest; and attorneys' fees, costs and expenses.

SECOND CAUSE OF ACTION

Breach of Contract – Refusal to Cover the *Royal Park* Settlement

39. U.S. Bank repeats and realleges all the preceding paragraphs of the Complaint as if fully set forth herein.

40. The *Royal Park* settlement constitutes **Loss**, and that **Loss** is covered under the terms of the applicable Insuring Clause. Specifically, the mere *potential* (after costly litigation) for reimbursement by a “trust, estate, plan or fund and/or any similar entity and/or the sponsor of any trust, estate, plan or fund and/or any similar entity” does not mean that the settlement is “reimbursable.”

41. U.S. Bank has satisfied all conditions precedent to coverage with respect to the *Royal Park* settlement and/or its performance of conditions precedent was otherwise excused. In particular, (a) U.S. Bank provided timely notice of the *Royal Park* case; (b) it provided Federal with all information, assistance and cooperation that Federal could reasonably request with respect to the *Royal Park* settlement; and (c) it did nothing to increase Federal's exposure under the Policy. Further, in advance of the settlement negotiations, Federal refused to reimburse U.S. Bank for the *Royal Park* settlement and thereby breached its obligations under the Federal Policy. Accordingly, U.S. Bank was excused from obtaining Federal's consent to the *Royal Park* settlement.

42. No exclusion in the Followed Policy or the Federal Policy bars coverage for the *Royal Park* settlement.

43. By reason of the foregoing, Federal is liable to U.S. Bank for damages, the exact amount to be proven at trial, including, but not limited to, the portion of the *Royal Park* settlement covered under the Federal Policy; consequential damages; pre-judgment and post-judgment interest; and attorneys' fees, costs and expenses.

THIRD CAUSE OF ACTION

Breach of Contract – Refusal to Cover Unreimbursed Defense Costs

44. U.S. Bank repeats and realleges all the preceding paragraphs of the Complaint as if fully set forth herein.

45. The Unreimbursed Defense Costs incurred in the RMBS Litigation constitute **Loss**, and that **Loss** is covered under the terms of the **Insuring Clause**.

46. U.S. Bank has satisfied all conditions precedent to coverage with respect to the Unreimbursed Defense Costs. In particular, (a) U.S. Bank provided timely notice of the RMBS Litigation; (b) it provided Federal with all information, assistance and cooperation that Federal could reasonably request in connection with the RMBS Litigation, (c) it did nothing to increase Federal's exposure under this Policy; and (d) it obtained Federal's consent to incur **Defense Costs**.

47. No exclusion in the Followed Policy or the Federal Policy bars coverage for the Unreimbursed Defense Costs.

48. Federal has refused to reimburse U.S. Bank for Unreimbursed Defense Costs in the RMBS litigation.

49. By reason of the foregoing, Federal is liable to U.S. Bank for damages, the exact amount to be proven at trial, including, but not limited to: the amount of

Unreimbursed Defense Costs covered under the Federal Policy; consequential damages; pre-judgment and post-judgment interest; and attorneys' fees, costs and expenses.

FOURTH CAUSE OF ACTION

Declaratory Judgment

50. U.S. Bank repeats and realleges all the preceding paragraphs of the Complaint as if fully set forth herein.

51. An actual and justiciable controversy exists between U.S. Bank and Federal regarding, among other things, Federal's position that none of the pending claims and lawsuits in the RMBS Litigation involve claims for **Loss** because of U.S. Bank's purported rights of indemnification from the trusts. Federal, in taking this position and refusing to pay under the Federal Policy, has wrongfully denied coverage for all of the RMBS Litigation, and breached the contract. Accordingly, U.S. Bank no longer has any obligation to satisfy conditions precedent to coverage, such as obtaining consent for any future settlement or to preserve any rights of contribution against or from any trust. U.S. Bank is entitled to a declaration from this Court in that regard.

52. Where U.S. Bank is faced with a disputed or likely disputed right to indemnity from a trust, any **Defense Costs**, settlements or judgments with respect to the applicable trusts are not "reimbursable to the **Insureds** by the trust, estate, plan or fund and/or any similar entity and/or the sponsor of any trust, estate, plan or fund and/or any similar entity." Accordingly, the exception to the definition of **Loss** set forth in subparagraph 4) of that definition is inapplicable, and U.S. Bank is entitled to a declaration from this Court in that regard.

53. U.S. Bank is entitled to settle claims at issue in the RMBS Litigation and, in doing so, release or forego any potential right to indemnification from the trust where U.S. Bank determines it is reasonable and prudent to do so. Federal cannot unreasonably withhold consent to such a settlement and any claim that U.S. Bank should refuse to release or forego any potential indemnity right against the trust is not a reasonable basis for withholding consent. U.S. Bank is entitled to a declaration from this Court in that regard.

WHEREFORE, U.S. Bank prays for judgment against Federal as follows:

1. For an award of damages in excess of \$75,000 for Federal's breaches of contract;
2. For a declaration that the settlements in *Blackrock* and *Royal Park* constitute **Loss** as that term is used in the Federal Policy;
3. For a declaration that U.S. Bank is entitled to forego any potential claim for indemnity against the trust in the RMBS Litigation where it is reasonable and prudent to do so as part of a settlement and that Federal is not permitted to withhold consent or otherwise refuse coverage on the basis there is no **Loss**;
4. For statutory pre-judgment interest on the amounts awarded herein;
5. For attorneys' fees, costs and expenses incurred herein; and
6. For such other relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all claims and defenses so triable.

Date: January 21, 2020

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