

Outside Capacity Exclusion Bars Coverage

October 2008

The United States District Court for the Eastern District of Pennsylvania has held that a professional liability policy's outside capacity exclusion bars coverage for claims arising out of professional services performed by an accountant for a company for which he served as an officer. *Everest Nat'l Ins. Co. v. J. Daniel Brett & Co., P. C.*, 2008 WL 4083175 (E.D. Pa. Aug. 29, 2008). The court rejected the accountant's argument that some of the claims in the underlying lawsuit did not involve his dual role as an officer and as an accountant.

The insured accountant sought coverage under his employer's professional liability policy. The underlying lawsuit alleged that he, as well as his employer, assisted his employer's client in fraudulently misappropriating funds from a corporation. The insured, in addition to his role as a certified public accountant, also served as an officer of that corporation.

The insurer denied coverage for the underlying lawsuit based on an exclusion for any claim "arising out of any Insured's involvement in, or professional services performed for, any entity not named in the Declarations if, at the time the professional services are performed, an Insured is an officer, director, partner, member, manager or employee of such entity . . ."

In the ensuing coverage litigation, the accountant argued that some of the allegations in the underlying litigation did not relate to his status as an officer of the company. The court, noting that the insurer must defend "if the underlying complaint avers any facts that potentially could support a recovery under the policy," nonetheless concluded that there was no potential for coverage because "all of the claims in the complaint 'arise out of' the involvement of [the insured] in performing both professional services, and also serving [as an officer of the client corporation]."