

Insured's Status When Claim Is Deemed Made Controls Application of Business Enterprise Exclusion; Indirect Ownership Is Sufficient

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A California appellate court has held that a business enterprise exclusion in a lawyers' professional liability policy prohibited coverage for a lawsuit brought against an insured despite the insured's argument that he no longer managed the claimant entity when the lawsuit was filed and that he owned the claimant only indirectly through a revocable trust. *Carolina Cas. Ins. Co. v. L.M. Ross Law Group, LLP*, 2010 WL 1534103 (Cal. App. Apr. 19, 2010). The court held that the insured's status at the time the claim is deemed made for coverage purposes controls, and that indirect ownership is sufficient to trigger the exclusion.

The insured lawyer gave notice of a potential malpractice claim to his carrier in September 2005, just before the expiration of the policy. The client later sued the lawyer's firm in December 2007. The policy provided that the claim was deemed made at the time the notice of potential claim was submitted to the insurer. The policy excluded coverage for any claim by a business enterprise other than the insured "in which the Insured owns more than a ten percent interest, or in which any Insured is an owner, partner, or employee, or which is directly or indirectly controlled, operated, or managed by any Insured." The insured indisputably managed the claimant entity at the time the potential claim first was noticed but not when the lawsuit was filed. Moreover, the entity was owned at all relevant times by a revocable trust of which the insured was trustee and settlor.

The court held that the business enterprise exclusion barred coverage for two independent reasons. First, the court held that application of the exclusion must be determined as of the date the claim is deemed made for coverage purposes, not when the lawsuit actually was filed. Since the insured indisputably managed the claimant enterprise at the time the notice of potential claim was submitted, the exclusion barred coverage even if the insured no longer managed the entity when the lawsuit was filed. Second, the insured indisputably owned more than 10% of the entity at all relevant times through a revocable trust. The court found that such indirect ownership was sufficient to trigger the business enterprise exclusion because the potential for a "collusive assertion of liability" was the same whether the insured owned the entity directly or through a revocable trust.