

# No Coverage Under Lawyers Professional Liability Policy Based on Business Enterprise Exclusion

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The United States District Court for the District of New Jersey has held that there is no coverage under a lawyers professional liability insurance policy where the policy's business enterprise exclusion precluded coverage. *Am. Guar. & Liab. Ins. Co. v. Falk*, 2011 WL 4499282 (D.N.J. Sept. 27, 2011).

The insurer issued a lawyers professional liability insurance policy to the insured, a sole practitioner. The policy included a business enterprise exclusion stating that the policy did not apply to any claim based upon or arising out of, in whole or in part, the insured's capacity or status as "an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise, charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust[.]"

Years before the inception of the policy, the insured was employed at an accounting firm. During the course of that employment, the insured assisted in planning and implementing a trust on behalf of some of the accounting firm's clients. Years later, after the policy had incepted, the accounting firm's clients brought suit against the insured and the accounting firm alleging various wrongful acts in connection with the prior representation. The complaint asserted that, at all relevant times, the insured was an employee of the accounting firm, performed services on behalf of the firm, and had his services billed through the firm.

The insured sought coverage under the policy and, in the coverage litigation that followed, the insurer asserted that the policy's business enterprise exclusion precluded coverage. The insured argued that the exclusion was inapplicable because the claim involved the provision of legal services and alleged legal malpractice. The insured also argued that the exclusion should not apply because the terms "business enterprise" and "arising out of" were ambiguous.

The court granted the insurer's motion for summary judgment. The court first noted that, although the claim at issue was for legal malpractice, it was asserted against the insured in his capacity as an employee of the accounting firm, and not as a solo practitioner. The court explained that the "clear import and intent" of the policy's business enterprise exclusion was "to preclude malpractice claims based on [the insured's] conduct outside of his capacity as a solo practitioner."

The court found irrelevant the fact that, while working at the accounting firm, the insured also maintained a separate law practice in the same building. In this regard, the court noted that the insured was an employee of the accounting practice and had an office there, and that it was the accounting practice, and not the insured, that had billed the clients for the insured's services. The court concluded that no reasonable jury would differ as to whether the underlying legal malpractice claim stemmed, at least in part if not entirely, from the insured's capacity as an accounting firm employee. Thus, the court concluded that coverage was barred by the clear and unambiguous terms of the policy's business enterprise exclusion.