

# Coverage Information



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## The Benefit and Business Exclusion (Exclusion 6)

This information sheet explains what claims are excluded from coverage by Exclusion 6.1, the “benefits exclusion”, and Exclusion 6.2, the “business exclusion”, in the [BC Lawyers Professional Liability Indemnification Policy](#)<sup>1</sup> (the “Policy”). This information is intended only as a guide. The wording of the Policy governs any claim or potential claim.

### Definitions

These defined terms are used in this document:

- **Family** means the licensee’s spouse, children, parents, or siblings
- **Colleagues** means the licensee’s firm, partners, apparent partners, MDP partners, associates, or associate counsel

### Exclusion 6.1 - the “benefit exclusion” explained

The Policy excludes coverage for a claim where a payment could benefit you, your Family or your firm. Exclusion 6.1 most often arises when you act for yourself or Family on a personal matter, but not always. For example:

- You act for your father in a personal injury action leading to a settlement. Your father talks to his neighbours months later and develops settler’s remorse. He sues you alleging professional negligence in the handling of his claim resulting in an improvident settlement. This claim would not be covered as payment of it would directly benefit your father.
- Your spouse borrows funds from a business associate and you prepare and register a mortgage over the matrimonial home to secure the debt. The mortgage goes into default and there is insufficient equity to repay the debt. The business associate sues your spouse

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<sup>1</sup> [www.lif.ca/your-policy/](http://www.lif.ca/your-policy/)

for the shortfall, and you, claiming they relied on you *qua* licensee to provide appropriate security for the loan. There would be no coverage for this claim as the payment of it would directly benefit your spouse by discharging their obligation to repay the loan. It would also benefit you on the basis that a financial gain to your spouse would be to your indirect advantage.

- You act for your brother-in-law on a matter where payment of any claim directly or indirectly benefits your sister.

### ***Due diligence***

When a client relationship will trigger Exclusion 6.1, you should not act, but your colleagues may act without triggering Exclusion 6.1.

Acting for yourself, friends, family, or colleagues presents an undue risk for several reasons:

- Your personal interest may lead to more casual or less thorough service, acting outside of your expertise, acting in a conflict, or acting with clouded judgment.
- You may experience additional social pressure, potential conflicts with your firm, and unmanageable client expectations.
- LIF's ability to successfully defend a claim could be compromised by your desire to assure the claimant's recovery.
- Your legal services in relation to an arms-length trust, where you are also a trustee, increases the risk of claims. More information on this risk is provided in [Executors, trustees and other fiduciaries](#)<sup>2</sup>.

Read '[About to act for family or friends? \(Resist, it's just too risky\)](#)<sup>3</sup>' before agreeing to act.

### **Exclusion 6.2 - the “business exclusion”**

The Policy does not apply to a claim connected to an organization where you, your Family, or your Colleagues have effective management or control, or beneficial ownership in an amount greater than 10%. Defence and indemnity coverage are excluded for both you and for any

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<sup>2</sup> [www.lif.ca/your-policy/what-activities-are-covered-and-what-are-not/executors-trustees-and-other-fiduciaries/](http://www.lif.ca/your-policy/what-activities-are-covered-and-what-are-not/executors-trustees-and-other-fiduciaries/)

<sup>3</sup> [www.lif.ca/risk-management/practice-management-wellness-risks-and-tips/acting-for-family-and-friends/](http://www.lif.ca/risk-management/practice-management-wellness-risks-and-tips/acting-for-family-and-friends/)

Colleague and firm vicariously liable for your error.<sup>4</sup> On business matters when there is no coverage, refer your client to counsel outside your firm.

Effective management or control, or beneficial ownership of an organization, depends on the particular circumstances present at the time the services were rendered and the claim is advanced. Some factors relevant to determining effective management or control are:

- Are you, your Family, or Colleague an officer or director of the organization? If so, how many other officers or directors does the organization have?
- Do you, your Family, or Colleagues have sufficient ownership or influence to elect a majority of the directors or maintain *de facto* control of the organization?
- Do you, your Family, or Colleagues have day to day management of the organization's affairs?

An example of beneficial ownership is:

- You and your spouse own all the shares of Holding Co, which owns 50% of the shares of ABC Co, which in turn owns 25% of the shares of DEF Co. Any claim arising from your provision of legal services to ABC Co or DEF Co would not be covered.

### ***Application to trusts***

Although the definition of 'organization' is very broad, it does not include trusts. As a result, you can provide legal services to your partner's family trust, for instance, without concern that the relationship itself might trigger Exclusion 6.2. However, there may still be circumstances associated with a trust where Exclusion 6.2 may apply. For example:

- You, your Family, or your Colleagues own, control, or manage ABC Ltd. You and your sister are the sole contingent beneficiaries of FamTrust Co, a trust set up by your father who has rolled all the shares of ABC Ltd. into it. Any claim arising from you providing legal services to ABC Ltd. would not be covered.

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<sup>4</sup> Condition 6.3 of the Policy extends limited coverage for a licensee's former partners (although not the licensee) in circumstances where, for example, the licensee acts for an organization and later acquires beneficial ownership in an amount greater than 10% or effective management or control of the organization.

## ***Due diligence***

Your firm should implement a due diligence process to discover whether any of the partners, associates, or associate counsel are providing legal services in circumstances that would trigger the application of Exclusion 6.2. Asking licensees at your firm these two questions will aid in identifying risks that may not be covered by the Policy:

1. Are you providing legal services in circumstances that may be affected by Exclusion 6.2?
2. Are you aware of any other licensee at the firm providing legal services in circumstances that may be affected by Exclusion 6.2?

If any offending activities are disclosed, the firm will need to decide whether or not to continue providing the services, given that coverage will not be available. If a licensee at the firm is providing services that will invoke the exclusion and the firm can prove it made an honest effort to discover the circumstances, there is coverage under the Insuring Agreement 2.11 of Policy for vicarious liability of the firm's partners who were unaware of the offending activities.

## **Law Society Code of Conduct and Rules**

Rules 3.4-26.1 to 3.4-43 of the Code of Conduct contain the general principles that should guide you in instances where you are involved as both a legal advisor and a participant in the business relationship. It is your responsibility to ensure that you are acting in accordance with the Code and the Law Society's Rules.

## **Lawyers Indemnity Fund**

Coverage for any claim or potential claim is determined by the Policy wording. If you would like our position on the application of the Exclusion 6 to a particular set of circumstances, please contact one of our [advance ruling advisors](#)<sup>5</sup>.

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<sup>5</sup> [www.lif.ca/about-us/our-people/contact-us-by-types-of-inquiries/](http://www.lif.ca/about-us/our-people/contact-us-by-types-of-inquiries/)