

# Liability Issues for Officers and Directors

## **Personal Liabilities of Officers and Directors:**

Officers and directors of a corporation may be subject to personal liability for acts performed as an officer or director. These liabilities can be divided into two types--liabilities for which the corporation may indemnify the officer or director and those liabilities for which indemnity is not available. Examples of liabilities that are not subject to indemnity include:

- Intentional breach of the duty of care to the corporation
- Intentional breach of the duty of loyalty to the corporation
- Misappropriation of a corporate asset for personal use
- Commingling of personal and business assets
- Failure to disclose a potential or actual conflict- of interest
- Crimes against the Corporation

Actions subject to indemnity include all actions taken in good faith on behalf of the corporation as an officer or director. These liabilities may include allegations of defamation, unlawful employment practices, breach of contract, unpaid wages and unpaid tax withholding.

## **Indemnification of Officers and Directors:**

Indemnification of officers and directors means that the corporation will provide for expenses incurred and amounts paid in defending claims brought against them for actions taken in good faith on behalf of the corporation. This indemnification is “first dollar” indemnification, which means that legal representation and defense is provided directly by the corporation as opposed to fronted by the officer or director and later reimbursed by the corporation.

Indiana law has recognized that without some method to limit the liability of officers and directors for claims brought against them, it would be difficult for corporations to find anyone willing to serve as officers or directors. As a result, Indiana law provides for indemnification of corporate officers and directors and permits corporation to purchase insurance to protect against these liabilities. These indemnification provisions have been incorporated into Section 13.1 of the Bylaws.

## **Directors and Officers Liability Insurance:**

Directors and officers liability insurance (often called D&O insurance) is liability insurance payable to the directors and officers of a company, or to the organization(s) itself, to cover damages or defense costs in the event they suffer such losses as a result of a lawsuit for alleged wrongful acts while acting in their capacity as directors and officers for the organization. Such coverage can extend to defense costs arising out of criminal and regulatory investigations/trials as well; in fact, often civil and criminal actions are brought against directors/officers simultaneously. D&O insurance covers liabilities of the corporation as well as the personal liabilities for the directors and officers of the corporation.

The Archdiocese maintains D&O insurance on each of the parish corporations and each of its officers and directors up to a limit of \$15,000,000 per occurrence and in aggregate.

**Frequently Asked Questions:**

***Can I be sued if I serve as a member of the parish Board of Directors?***

Yes. Under our legal system a lawsuit can be filed against anyone. Many meritless lawsuits that name individual officers or directors are filed each day. This is the reason that corporations maintain D&O insurance. Whether the claims have merit or not, if the officer or director was acting in good faith on behalf of the corporation, the officer or director is entitled to be fully indemnified.

***Can I be held liable for claims against the corporation based on my status as a director or officer?***

No. Consider, for example, a lawsuit is filed against the parish by an individual attending the weekly bingo game who falls because of a poorly maintained staircase railing.

If the court finds in favor of the bingo guest, it could issue a judgment against the parish for a large amount -- perhaps greater than the parish's insurance coverage. (Very unlikely). The amount of the judgment that exceeds the available insurance becomes a debt of the parish. But because of the parish' corporate status, the parish's directors, officers, and members are not personally responsible for paying that debt. The liability is limited to the assets of the parish corporation.

***As an officer or director of my parish can I become personally liable for my actions?***

Yes. If you fail to act in good faith, misappropriate assets or use the corporation for personal gain you may be held liable. Such liabilities, if found to be meritorious, would not be subject to indemnity by the corporation.

***Are my personal assets at risk if I serve as a parish board member or officer?***

Yes, but such risk is very unlikely. Before your personal assets would be at risk the following must occur: (1) a judicial determination that the claim asserted the corporation has merit; (2) a judicial determination that the claim asserted against the corporation is not limited to the corporate assets; (limited liability of the corporate form does not apply); (3) a judicial determination that as a corporate director or officer you should be held personally liable for your conduct; and (4) the damages awarded against you exceed the combined assets of the corporation and the D&O insurance maintained.

***What would happen if I were sued in my capacity as an officer or director of the parish?***

First a decision would be made to determine if the claim was one that would be subject to indemnification. The operative language from the Bylaws Section 13.1 provides:

The indemnification shall only apply if he/she acted in good faith and in a manner he/she reasonably believed to be in, or not opposed to, the best interest of the Corporation.

Provided the acts are subject to indemnity, the Archdiocese through its insurance program would immediately tender a defense to the directors and/or officer and indemnify him/her against expenses (including attorney's fees), judgment and fines, in connection with such action, suit or proceeding.

***Is the potential exposure to directors and officer's liability a sufficient reason to decide not to serve as a director or officer of the parish?***

Clearly this is a personal choice you can make with your own counsel. The Archdiocese uses best practices to limit the liability of its parishes through its internal risk management program that is implemented in association with the Archdiocesan insurance program. In the event a D&O liability would be presented, the Archdiocese is confident that it is fully insured for any potential claim. The benefits of serving the parish far outweigh any potential for an adverse claim.

***What are the Archdiocese's insurance coverage limits?***

The Archdiocese's insurance coverage limits can be found at:

<http://www.archindy.org/finance/files/incorporation/Insurance%20coverage.pdf>