

Can You Rely on Your Corporate Indemnity and D&O Insurance?

Unfortunately, you can't always collect on indemnities and insurance. The directors of Enron and WorldCom learned this the hard way. Those directors agreed to pay out of their own pockets to settle the litigation against them: the WorldCom directors paid \$24 million and the Enron directors paid \$13 million.

Some circumstances where it may be difficult or impossible for you to collect on your corporate indemnity are:

- The company could be bankrupt when you try to collect.
- The company may not want to pay you and may force you to sue it to collect. You may have to pay your own expenses of suing the company to collect on the indemnity.
- You may not be able to collect because the plaintiffs show you did not act in good faith.

Depending on the exact wording of the company's D&O policies, it may be difficult for you to recover all your losses from the carriers in some circumstances. For example:

- If the company gave false information (for example, false financial statements as may be the case if there is a later restatement) in its application, the insurance company may try to rescind the policy and deny coverage.
- The policy limits may be exceeded.
- You may have to split the coverage with the officers and other directors.
- Defense costs will reduce the coverage available.
- Bad acts of management may make the policy void.
- A company bankruptcy may interfere with your ability to collect on some policies.
- The policy may be subject to fraud, improper personal benefit and other exclusions.
- Allocation provisions may allow the carrier to try to limit its coverage to a percentage (less than 100%) of the claims.

If you have any questions regarding corporate indemnity or D&O insurance, please contact Michael Whalen (mwhalen@wllpweb.com), Phyllis Schneider (pschneider@wllpweb.com), Karen Goodin (kgoodin@wllpweb.com) or Kirsten Foos (kfoos@wllpweb.com) of Whalen LLP at (714) 384-4340.