

# **WEST VIRGINIA LEGISLATURE**

**2022 REGULAR SESSION**

**ENGROSSED**

**Committee Substitute**

**for**

**Senate Bill 6**

BY SENATORS TRUMP, NELSON, TAKUBO, AND AZINGER

[Originating in the Committee on the Judiciary;

reported on February 3, 2022]



1 A BILL to amend and reenact §31B-3-303 of the Code of West Virginia, 1931, as amended,  
2 relating to establishing the intent and policy of the Legislature that common law corporate  
3 “veil piercing” claims may not be used to impose personal liability on a member or manager  
4 of a limited liability company; nullifying the Supreme Court of Appeals of West Virginia’s  
5 decision in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013);  
6 clarifying circumstances in which members of a limited liability company may be held liable  
7 in their capacity as members for debts, obligations, or liabilities of the company; providing  
8 for liability of non-human members of a limited liability company under doctrine of joint  
9 enterprise liability; providing for liability of a member of a limited liability company as a  
10 tortfeasor; authorizing a creditor of a limited liability company to seek “clawback” from a  
11 member of limited liability company under certain circumstances; and defining terms.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 3. RELATIONS OF MEMBERS AND MANAGERS TO PERSONS DEALING  
WITH LIMITED LIABILITY COMPANY.**

**§31B-3-303. Liability of members and managers.**

1 (a) Except as otherwise provided in subsection (c) of this section, the debts, obligations,  
2 and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely  
3 the debts, obligations, and liabilities of the company. A member or manager is not personally  
4 liable for a debt, obligation, or liability of the company solely by reason of being or acting as a  
5 member or manager. It is the intent and policy of the Legislature to modify the applicability of the  
6 “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268,  
7 752 S.E.2d 299 (2013) with respect to any claim against a limited liability company arising after  
8 the effective date of the reenactment of this section during the regular session of the Legislature,  
9 2022.

10 (b) The failure of a limited liability company to observe the usual company formalities or  
11 requirements relating to the exercise of its company powers or management of its business is not  
12 a ground for imposing personal liability on the members or managers for liabilities of the company.

13 (c) All or specified members of a limited liability company are liable in their capacity as  
14 members for all or specified debts, obligations, or liabilities of the company if:

15 ~~(1) A provision to that effect is contained in the articles of organization; and~~

16 ~~(2) A member so liable has consented in writing to the adoption of the provision or to be~~  
17 ~~bound by the provision~~

18 (1) A provision to that effect is contained in the articles of organization, and a member so  
19 liable has consented in writing to the adoption of the provision or to be bound by the provision;

20 (2) The member against whom liability is asserted has personally guaranteed the liability  
21 or obligation of the limited liability company in writing;

22 (3) There is any tax liability of the limited liability company, which the law of the state or of  
23 the United States imposes liability upon the member;

24 (4) The member commits actual or constructive fraud which causes injury to an individual  
25 or entity; or

26 (5) There is any fine, fee, or penalty assessed to the limited liability company pursuant to  
27 local, state, or federal law.

28 (d) The “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*,  
29 232 W.Va. 268, 752 S.E.2d 299 (2013) shall apply to a claim asserted against a limited liability  
30 company for the purpose of determining personal liability of all or specified members or managers  
31 only if (1) the company is not adequately capitalized for the reasonable risks of the corporate  
32 undertaking and (2) the company does not carry liability insurance coverage for the primary risks  
33 of the business, with minimum limits of \$50,000 per person and \$100,000 per occurrence, or such  
34 higher amount as may be specifically required by law.

35 (e) Enterprise liability. — In circumstances where the members of a limited liability  
36 company are, in whole or in part, corporations, limited liability companies, or other entities which  
37 are not human beings, then, if a jury shall determine that the liability of a limited liability company  
38 sounding in tort arose as part of the activities of a joint enterprise, those entities which are part of  
39 the joint enterprise with the limited liability company may be liable for the liability of the limited  
40 liability company which arose as part of the business operations of the joint enterprise, not as a  
41 “piercing of the veil”, but instead under the doctrine of joint enterprise liability.

42 (f) Member as tortfeasor. — Nothing in this section may immunize or shield a member of  
43 a limited liability company, solely because he or she is a member of a limited liability company,  
44 from liability for his or her own tortious conduct that proximately causes injury to another party  
45 while the member is acting on behalf of the limited liability company. In such circumstance, the  
46 liability of a member is not through “veil piercing”, but rather primary, as against any tortfeasor.

47 (g) Clawback authority. — If a member is proved to have committed any of the following  
48 acts, then a creditor of the limited liability company whose judgment the limited liability company  
49 cannot satisfy may seek clawback from the member under this subsection: *Provided*, That the  
50 limited liability company’s judgment creditor may proceed in the shoes of the limited liability  
51 company to clawback funds from the member in order to reimburse the limited liability company  
52 for either the amount of the judgment against the limited liability company or the amount  
53 transferred from the limited liability company to the member in bad faith, whichever is less. The  
54 wrongful acts which will justify clawback, but not “veil piercing”, are:

- 55 (1) Conflicted exchange;
- 56 (2) Insolvency distribution; or
- 57 (3) Siphoning of funds.

58 (h) Definitions. — As used in this section:

59 (1) “Conflicted exchange” means a transfer of money or other property from a limited  
60 liability company to a member of the limited liability company, or to any other organization in which

61 the member has a material financial interest, in exchange for services, goods, or other tangible  
62 or intangible property of less than reasonable equivalent value.

63 (2) "Insolvency distribution" means a transfer of money or other property from a limited  
64 liability company to a member of that limited liability company, or to any other organization in  
65 which the member has a material financial interest, in respect of the member's ownership interest,  
66 that renders the limited liability company insolvent.

67 (3) "Insolvent" means, with respect to a limited liability company, that the limited liability  
68 company is unable to pay its debts in the ordinary course of business. Claims that are unusual in  
69 nature or amount, including tort claims in claims for consequential damages, are not to be  
70 considered claims in the ordinary course of business for the purposes of this section.

71 (4) "Siphoning of funds" means whether the manager or majority member has siphoned  
72 funds from the limited liability company in violation of the articles of organization, the operating  
73 agreement, or this article.