

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

ENROLLED

Committee Substitute

for

Senate Bill 6

BY SENATORS TRUMP, NELSON, TAKUBO, AND AZINGER

[Passed March 12, 2022; in effect 90 days from passage]

1 AN ACT to amend and reenact §31B-3-303 of the Code of West Virginia, 1931, as amended,
2 relating to the applicability of “corporate veil piercing” analysis to impose personal liability
3 on a member or manager of a limited liability company; clarifying that members or
4 managers of a limited liability company are not personally liable for fines, fees, or penalties
5 individually assessed against another member or manager for unrelated acts; establishing
6 the intent and policy of the Legislature to modify the applicability of “corporate veil piercing”
7 analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299
8 (2013) with respect to certain claims against a limited liability company; clarifying
9 circumstances in which members of a limited liability company may be held liable in their
10 capacity as members for debts, obligations, or liabilities of the company; establishing
11 criteria required for court to apply “corporate veil piercing analysis” in certain claims
12 asserted against a limited liability company; providing for liability of non-human members
13 of a limited liability company under doctrine of joint enterprise liability; providing for liability
14 of a member of a limited liability company as a tortfeasor; authorizing a creditor of a limited
15 liability company to seek “clawback” from a member of limited liability company under
16 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 nor for fines, fees or penalties individually assessed against another member

6 or manager for acts unrelated to the business of the limited liability company. It is the intent and
7 policy of the Legislature to modify the applicability of the “corporate veil piercing” analysis adopted
8 in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013) with respect to
9 any claim against a limited liability company arising after the effective date of the reenactment of
10 this section during the regular session of the Legislature, 2022.

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

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

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

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

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

22 (4) The member commits actual or constructive fraud which causes injury to an individual
23 or entity.

24 (d) The “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*,
25 232 W.Va. 268, 752 S.E.2d 299 (2013) shall apply to a claim asserted against a limited liability
26 company for the purpose of determining personal liability of all or specified members or managers
27 only if (1) the company is not adequately capitalized for the reasonable risks of the corporate
28 undertaking and (2) the company does not carry liability insurance coverage for the primary risks
29 of the business, with minimum limits of \$100,000 liability insurance, or such higher amount as
30 may be specifically required by law.

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

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

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

- 51 (1) Conflicted exchange;
- 52 (2) Insolvency distribution; or
- 53 (3) Siphoning of funds.

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

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

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

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

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

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Day of, 2022.

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Governor