

# **WEST VIRGINIA LEGISLATURE**

**2022 REGULAR SESSION**

**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 that for any claim against a  
6 limited liability company arising after the effective date of the reenactment of this section during  
7 the regular session of the Legislature, 2022, common law corporate “veil piercing” claims may not  
8 be used to impose personal liability on a member or manager of a limited liability company, and  
9 that the West Virginia Supreme Court of Appeals’ decision in *Joseph Kubican v. The Tavern, LLC*,  
10 232 W.Va. 268, 752 S.E.2d 299 (2013) be nullified.

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~~

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

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

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

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

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

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

29 (6) The limited liability company fails to carry liability insurance coverage at a minimum of  
30 \$50,000 per person and \$100,000 per occurrence.

31 (d) 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 (e) 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 (f) 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 (g) 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.