

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 555

BY SENATOR FERNS

[Introduced February 15, 2018; Referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §31D-8-831 of the Code of West Virginia, 1931, as amended,
 2 relating to liability for directors of corporations; and providing that a director of a
 3 corporation is not personally liable for the corporation's torts, or the torts of its agents or
 4 employees, unless he or she directed, sanctioned, or participated in the wrongful acts.

Be it enacted by the Legislature of West Virginia:

ARTICLE 8. DIRECTORS AND OFFICERS.

§31D-8-831. Standards of liability for directors.

1 (a) A director is not liable to the corporation or its shareholders for any decision to take or
 2 not to take action, or any failure to take any action, as a director, unless the party asserting liability
 3 in a proceeding establishes that:

4 (1) Any provision in the articles of incorporation authorized by §31D-2-202(b)(4) of this
 5 code or the protections afforded by §31D-8-806 or §55-7C-1 *et seq.* of this code interposed as a
 6 bar to the proceeding by the director, does not preclude liability; and

7 (2) The challenged conduct consisted or was the result of:

8 (A) Action not in good faith; or

9 (B) A decision: (i) Which the director did not reasonably believe to be in the best interests
 10 of the corporation; or (ii) as to which the director was not informed to an extent the director
 11 reasonably believed appropriate in the circumstances; or

12 (C) A lack of objectivity due to the director's familial, financial or business relationship with,
 13 or a lack of independence due to the director's domination or control by, another person having a
 14 material interest in the challenged conduct: (i) Which relationship or which domination or control
 15 could reasonably be expected to have affected the director's judgment respecting the challenged
 16 conduct in a manner adverse to the corporation; and (ii) after a reasonable expectation has been
 17 established, the director does not establish that the challenged conduct was reasonably believed
 18 by the director to be in the best interests of the corporation; or

19 (D) A sustained failure of the director to devote attention to ongoing oversight of the

20 business and affairs of the corporation, or a failure to devote timely attention, by making or causing
21 to be made appropriate inquiry when particular facts and circumstances of significant concern
22 materialize that would alert a reasonably attentive director to the need for inquiry;

23 (E) Receipt of a financial benefit to which the director was not entitled or any other breach
24 of the director's duties to deal fairly with the corporation and its shareholders that is actionable
25 under applicable law.

26 (b) The party seeking to hold the director liable:

27 (1) For money damages, has the burden of establishing that:

28 (A) Harm to the corporation or its shareholders has been suffered; and

29 (B) The harm suffered was proximately caused by the director's challenged conduct; or

30 (2) For other money payment under a legal remedy, including compensation for the
31 unauthorized use of corporate assets, has whatever persuasion burden may be called for to
32 establish that the payment sought is appropriate in the circumstances; or

33 (3) For other money payment under an equitable remedy, including profit recovery by or
34 disgorgement to the corporation, has whatever persuasion burden may be called for to establish
35 that the equitable remedy sought is appropriate in the circumstances.

36 (c) Nothing contained in this section may: (1) In any instance where fairness is at issue,
37 including consideration of the fairness of a transaction to the corporation under §31D-8-860 of
38 this code, alter the burden of proving the fact or lack of fairness otherwise applicable; (2) alter the
39 fact or lack of liability of a director under another section of this chapter, including the provisions
40 governing the consequences of an unlawful distribution under §31D-8-833 of this code or a
41 transactional interest under §31D-8-860 of this code; or (3) affect any rights to which the
42 corporation or a shareholder may be entitled under another provision of this code or the United
43 States code.

44 (d) A director of a corporation is not personally liable for the corporation's torts, or the torts
45 of its agents or employees, unless he or she directed, sanctioned, or participated in the wrongful

46 acts.

NOTE: The purpose of this bill is to provide that a director of a corporation is not personally liable for the corporation's torts, or the torts of its agents or employees, unless he or she directed, sanctioned, or participated in the wrongful acts.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.