

# **WEST VIRGINIA LEGISLATURE**

## **2019 REGULAR SESSION**

**Introduced**

### **House Bill 2736**

BY DELEGATES KESSINGER, PACK, NELSON, HARDY AND

SYPOLT

[Introduced January 30, 2019; Referred  
to the Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §55-7L-1, §55-7L-2, and §55-7L-3, all relating to standards of proof in civil  
 3 actions where business structure sought to be disregarded; making findings; establishing  
 4 clear and convincing evidence as standard for personal liability of business debts;  
 5 adopting standards for determining personal liability for business debts; defining terms;  
 6 and establishing safe harbor requirements.

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

**ARTICLE 7L. STANDARDS RELATED TO CAUSES OF ACTION WHERE THE  
 CORPORATE, LLC, OR OTHER BUSINESS STRUCTURE IS SOUGHT TO BE  
 DISREGARDED.**

**§55-7L-1. Legislative findings and declaration of purpose.**

1 (a) Whereas, the West Virginia Legislature recognizes the importance of family  
 2 businesses in growing the economy, creating jobs, and generating tax revenue; and

3 (b) Whereas, individual family member protection against business liabilities is recognized  
 4 to be socially desirable by encouraging creation of family businesses but the current law providing  
 5 protection to the owners of family businesses is unduly complex and exposes the owners to  
 6 excessive and unfair liabilities, of which they are generally not aware.

7 (c) It is public policy of the State of West Virginia to maximize the protections provided to  
 8 current and former owners, managers, directors, officers, and other representatives of family  
 9 businesses. Resolution of all questions of law and fact and all matters relating thereto shall favor  
 10 strong support for this public policy.

**§55-7L-2. Burden of proof; applicable standards.**

1 (a) All factual and legal issues required to create personal liability for business debts or  
 2 liabilities shall be established by clear and convincing evidence.

3 (b) The following standards shall be utilized as the sole and exclusive basis for assessing

4 a business liability or debt against an individual:

5 (1) There shall be a strong presumption that current and former owners, managers,  
6 members of the board of directors, officers, or other representatives are not liable for the debts or  
7 liabilities of the family business.

8 (2) To be liable for the debts or liabilities of the business, plaintiffs must establish personal  
9 responsibility on the defendant, by clear and convincing evidence, that:

10 (A) The business failed to hold itself out as operating as a business or type of business  
11 entity. A business of any kind shall be deemed to be holding itself out as operating as a business  
12 entity if it generally uses within its name, on its letterhead, or in other publicly available information,  
13 abbreviations such as Inc., LLC., LP., or other words or information indicating it operates as a  
14 legal entity, or it generally operates in a manner that an individual would reasonably assume that  
15 it is a business entity and not an individual, and

16 (B) The defendant was actively participating in day-to-day operation of the business and,  
17 in cases involving a contract or other transaction, the defendant expressly represented to the  
18 plaintiff that the defendant was acting personally as an individual and not as a representative of  
19 the business, and

20 (C) The business itself is not “financially sound” as defined herein.

**§55-7L-3 Definitions.**

1 For purposes of this article.

2 (a) “Family Business” is defined as a business organization however structured (including,  
3 but not limited to, corporations, limited liability companies, limited partnerships, and including  
4 subsidiaries of such business, etc.,) which is not publicly traded on any stock exchange and which  
5 is owned (directly or through use of another entity such as parent - subsidiary business, a family  
6 trust, etc.) by members of not more than five families. A family includes those individuals  
7 commonly recognized as family members including a sole individual, an individual parent or  
8 grandparent, their lineal descendants, and the parent or grandparent’s siblings and the siblings’

9 lineal descendants, including stepchildren, adopted children, and spouses of all such family  
10 members.

11 (b) "Financially Sound" means that, given the totality of circumstances, the business had  
12 adequate capital to meet ordinary business needs, notwithstanding that the business does not  
13 maintain capital to pay for a potential judgment or liability incurred by the business. A business  
14 that meets at least one of the following safe harbor requirements shall be deemed financially  
15 sound, and adequately capitalized:

16 (1) The business has existed and has operated, no matter how structured or in what forms,  
17 for at least 20 years and it has never sought protection from creditors through bankruptcy  
18 proceedings.

19 (2) The owner has been an officer, director, manager, or owned an interest in one or more  
20 businesses totaling at least 20 years, none of which have sought bankruptcy protection during  
21 the owner's association with the business.

22 (3) If the business has audited financial statements for the business's most recent fiscal  
23 year immediately preceding the date during the alleged liability occurred, those statements do not  
24 contain a "going concern" qualification.

25 (4) The business has outside third-party verification that it is financially sound. Examples  
26 would include, but not be limited to, that a financial institution has made a loan to the business (or  
27 extended in-line of credit, whether or not used) during the time period when the alleged liability  
28 was incurred and the business was not in default of the loan.

29 (5) At the time the incident giving rise to the alleged liability occurred, the business entity's  
30 financial condition would be deemed creditworthy and/or adequately capitalized, which may be  
31 established by showing that its capitalization was reasonably comparable to other businesses in  
32 the same or a similar line of business using average industry-wide ratios (current ratio, acid-test  
33 ratio, debt/equity ratio, etc.) obtained from sources such as Dunn & Bradstreet, Moody's *Manual*  
34 of Investments, Standard and Poor's *Corporation Records*, financial institutions, certified public

35 accountants, etc.

36 (6) The business carried insurance that would be typical of this type and size of business,  
37 notwithstanding that the insurance does not cover the type or amount of liability alleged.

38 (7) The business is required by a government agency to meet financial standards to  
39 receive legal authority, a license, or other approval to legally operate, or to participate in a  
40 government-sponsored program.

NOTE: The purpose of this bill is to revise existing standards and establish the burden of proof imposed on civil litigants seeking to circumvent corporate structure in civil litigation.

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