

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 490

BY SENATORS AZINGER, TRUMP, MULLINS AND BOSO

[Introduced March 1, 2017; 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 section,
2 designated §31D-8-842a, relating to the standard of liability for officers of a corporation.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 section, designated §31D-8-842a, to read as follows:

ARTICLE 8. DIRECTORS AND OFFICERS.

§31D-8-842a. Standards of liability for officers.

1 (a) An officer 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 an officer, unless the party asserting liability
3 in a proceeding establishes that:

4 (1) Any provision in the articles of incorporation authorized by subdivision (4), subsection
5 (b), section two hundred two, article two of this chapter or the protections afforded by section eight
6 hundred sixty of this article or article seven-c, chapter fifty-five of this code interposed as a bar to
7 the proceeding by the officer, does not preclude liability; and

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

9 (A) Action not in good faith; or

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

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

20 (D) A sustained failure of the officer to devote attention to ongoing oversight of the
21 business and affairs of the corporation, or a failure to devote timely attention, by making or causing
22 to be made appropriate inquiry when particular facts and circumstances of significant concern
23 materialize that would alert a reasonably attentive officer to the need for inquiry;

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

27 (b) The party seeking to hold the officer liable:

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

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

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

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

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

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

NOTE: The purpose of this bill is to clarify the standard of liability for officers of a corporation.

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