

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 422

BY SENATOR TRUMP

[Introduced February 23, 2021; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §31B-3-303 of the Code of West Virginia, 1931, as amended,
2 relating to establishing that the intent and policy of the Legislature is that common law
3 corporate “veil piercing” claims may not be used to impose personal liability on a member
4 or manager of a limited liability company; and nullifying the Supreme Court of Appeals of
5 West Virginia’s decision in *Joseph Kubican v. The Tavern, LLC*. 232 W.Va. 268, 752
6 S.E.2d 299 (2013).

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, 2021, 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) As to a tax liability of the limited liability company, the law of the state or of the United
24 States imposes liability upon the member; or

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

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

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

38 (f) *Clawback authority.* — If a member is proved to have committed any of the following
39 acts, then a creditor of the limited liability company whose judgment the limited liability company
40 cannot satisfy may seek clawback from the member under this subsection: *Provided*, That the
41 limited liability company's judgment creditor may proceed in the shoes of the limited liability

42 company to clawback funds from the member in order to reimburse the limited liability company
43 for either the amount of the judgment against the limited liability company or the amount
44 transferred from the limited liability company to the member in bad faith, whichever is less. The
45 wrongful acts which will justify clawback (but not veil piercing) are:

46 (1) Conflicted exchange;

47 (2) Insolvency distribution; or

48 (3) Siphoning of funds.

49 (g) Definitions. — As used in this section:

50 “Conflicted exchange” means a transfer of money or other property from a limited liability
51 company to a member of the limited liability company (or to any other organization in which the
52 member has a material financial interest) in exchange for services, goods, or other tangible or
53 intangible property of less than reasonable equivalent value.

54 “Insolvency distribution” means a transfer of money or other property from a limited liability
55 company to a member of that limited liability company (or to any other organization in which the
56 member has a material financial interest), in respect of the member’s ownership interest, that
57 renders the limited liability company insolvent.

58 “Insolvent” means, with respect to a limited liability company, that the limited liability
59 company is unable to pay its debts in the ordinary course of business. Claims that are unusual in
60 nature or amount, including tort claims in claims for consequential damages, are not to be
61 considered claims in the ordinary course of business for the purposes of this section.

62 “Siphoning of funds” means whether the manager or majority member has siphoned funds
63 from the limited liability company in violation of the articles of organization, the operating
64 agreement, or this article.

NOTE: The purpose of this bill is to establish that the intent and policy of the Legislature is that common law corporate “veil piercing” claims may not be used to impose personal liability on a member or manager of a limited liability company; and nullifying the Supreme

Court of Appeals of West Virginia's decision in *Joseph Kubican v. The Tavern, LLC*. 232 W.Va. 268, 752 S.E.2d 299 (2013).

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