

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Introduced

House Bill 4774

BY DELEGATE STATLER

[Introduced February 15, 2022; 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; and
2 to further amend said code by adding thereto a new article, designated §55-7L-1, §55-7L-
3 2, and §55-7L-3, all relating to liability and standard of proof in certain civil actions against
4 business organizations and their owners, members, managers, directors, officers or other
5 representatives; applicability of “corporate veil piercing” analysis to impose personal
6 liability on a member or manager of a limited liability company; establishing the intent and
7 policy of the Legislature to modify the applicability of “corporate veil piercing” analysis
8 adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013)
9 with respect to certain claims against a limited liability company; clarifying circumstances
10 in which members of a limited liability company may be held liable in their capacity as
11 members for debts, obligations, or liabilities of the company; establishing criteria required
12 for court to apply “corporate veil piercing analysis” in certain claims asserted against a
13 limited liability company; providing for liability of non-human members of a limited liability
14 company under doctrine of joint enterprise liability; providing for liability of a member of a
15 limited liability company as a tortfeasor; authorizing a creditor of a limited liability company
16 to seek “clawback” from a member of a limited liability company under certain
17 circumstances; defining terms; standards of proof in civil actions where business structure
18 sought to be disregarded; making findings; establishing clear and convincing evidence as
19 standard for personal liability of business debts; adopting standards for determining
20 personal liability for business debts; defining terms; and establishing safe harbor
21 requirements..

Be it enacted by the Legislature of West Virginia:

CHAPTER 31B. UNIFORM LIMITED LIABILITY COMPANY ACT.

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 to modify the applicability of the
6 “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268,
7 752 S.E.2d 299 (2013) with respect to any claim against a limited liability company arising after
8 the effective date of the reenactment of this section during the regular session of the Legislature,
9 2022.

10 (b) The failure of a limited liability company to observe the usual company formalities or
11 requirements relating to the exercise of its company powers or management of its business is not
12 a ground for imposing personal liability on the members or managers for liabilities of the company.

13 (c) All or specified members of a limited liability company are liable in their capacity as
14 members for all or specified debts, obligations, or liabilities of the company if:

15 ~~(1) A provision to that effect is contained in the articles of organization; and~~

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

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

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

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

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

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

28 (d) The “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*,
29 232 W.Va. 268, 752 S.E.2d 299 (2013) shall apply to a claim asserted against a limited liability
30 company for the purpose of determining personal liability of all or specified members or managers
31 only if (1) the company is not adequately capitalized for the reasonable risks of the corporate
32 undertaking and (2) the company does not carry liability insurance coverage for the primary risks
33 of the business, with minimum limits of \$50,000 per person and \$100,000 per occurrence, or such
34 higher amount as may be specifically required by law.

35 (e) *Enterprise liability.* — In circumstances where the members of a limited liability
36 company are, in whole or in part, corporations, limited liability companies, or other entities which
37 are not human beings, then, if a jury shall determine that the liability of a limited liability company
38 sounding in tort arose as part of the activities of a joint enterprise, those entities which are part of
39 the joint enterprise with the limited liability company may be liable for the liability of the limited
40 liability company which arose as part of the business operations of the joint enterprise, not as a
41 “piercing of the veil”, but instead under the doctrine of joint enterprise liability.

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

47 (g) *Clawback authority.* — If a member is proved to have committed any of the following
48 acts, then a creditor of the limited liability company whose judgment the limited liability company
49 cannot satisfy may seek clawback from the member under this subsection: *Provided*, That the
50 limited liability company’s judgment creditor may proceed in the shoes of the limited liability
51 company to clawback funds from the member in order to reimburse the limited liability company

52 for either the amount of the judgment against the limited liability company or the amount
53 transferred from the limited liability company to the member in bad faith, whichever is less. The
54 wrongful acts which will justify clawback, but not “veil piercing”, are:

55 (1) Conflicted exchange;

56 (2) Insolvency distribution; or

57 (3) Siphoning of funds.

58 (h) Definitions. — As used in this section:

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

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

67 (3) “Insolvent” means, with respect to a limited liability company, that the limited liability
68 company is unable to pay its debts in the ordinary course of business. Claims that are unusual in
69 nature or amount, including tort claims in claims for consequential damages, are not to be
70 considered claims in the ordinary course of business for the purposes of this section.

71 (4) “Siphoning of funds” means whether the manager or majority member has siphoned
72 funds from the limited liability company in violation of the articles of organization, the operating
73 agreement, or this article.

CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

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 modify and clarify liability in civil actions against certain business organizations and their owners, members, managers, directors, officers or other representatives and establish against business organizations and their owners, members, managers, directors, officers or other representatives, and establish the standard of proof in those civil actions.

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