SENATE BILL NO. 490

BY SENATORS AZINGER, TRUMP, MULLINS AND BOSCHERT.

[Passed April 7, 2017; in effect 90 days from passage]
Enr. SB 490

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

ENROLLED

Senate Bill 490

BY SENATORS AZINGER, TRUMP, MULLINS AND BOSO

[Passed April 7, 2017; in effect 90 days from passage]
AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §31D-8-842a, relating to the standard of liability for officers of a corporation; establishing standards of liability for officers of a corporation; providing an officer is not liable to the corporation or its shareholders for any decision to take or not to take action or any failure to take any action as an officer except in specified circumstances; providing standards a party seeking to hold an officer liable must establish when seeking money damages; providing standards a party seeking to hold an officer liable must establish when seeking other legal remedies; and clarifying that certain actions under different code sections or the United States code are unaffected.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 8. DIRECTORS AND OFFICERS.

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

(a) An officer is not liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as an officer, unless the party asserting liability in a proceeding establishes that:

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

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

(A) Action not in good faith; or

(B) A decision: (i) Which the officer did not reasonably believe to be in the best interests of the corporation; or (ii) as to which the officer was not informed to an extent the officer reasonably believed appropriate in the circumstances; or
(C) A lack of objectivity due to the officer’s familial, financial or business relationship with, or a lack of independence due to the officer’s domination or control by, another person having a material interest in the challenged conduct: (i) Which relationship or which domination or control could reasonably be expected to have affected the officer’s judgment respecting the challenged conduct in a manner adverse to the corporation; and (ii) after a reasonable expectation has been established, the officer does not establish that the challenged conduct was reasonably believed by the officer to be in the best interests of the corporation; or

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

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

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

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

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

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

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

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

(c) Nothing contained in this section may: (1) In any instance where fairness is at issue, including consideration of the fairness of a transaction to the corporation under section eight
four hundred sixty of this article, alter the burden of proving the fact or lack of fairness otherwise
applicable; (2) alter the fact or lack of liability of an officer under another section of this chapter,
including the provisions governing the consequences of an unlawful distribution under section
eight hundred thirty-three of this article or a transactional interest under section eight hundred
sixty of this article; or (3) affect any rights to which the corporation or a shareholder may be entitled
under another provision of this code or the United States Code.
Enr. SB 490

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, Senate Committee

Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 21st Day of April 2017.

Governor
PRESENTED TO THE GOVERNOR

APR 20 2017

Time 10:40 am