

WEST VIRGINIA CODE: §33-10-26

§33-10-26. Voidable preferences and liens.

(a) A preference is a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the insurer within one year before the filing of a successful petition for liquidation under this article, the effect of which transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would have otherwise received. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, then the transfers are preferences if made or suffered within one year before the filing of the successful petition for rehabilitation, or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the liquidator if the insurer was insolvent at the time of the transfer; and

(1) The transfer was made within four months before the filing of the petition; or

(2) The creditor receiving it or to be benefitted thereby or his or her agent acting with reference thereto had, at the time when the transfer was made, reasonable cause to believe that the insurer was insolvent or was about to become insolvent; or

(3) The creditor receiving it was an officer, or any employee or attorney or other person who was in fact in a position of comparable influence in the insurer to an officer whether or not he or she held such position, or any shareholder holding directly or indirectly more than five percent of any class of any equity security issued by the insurer, or any other person, firm, corporation, association or aggregation of persons with whom the insurer did not deal at arm's length.

(c) (1) Notwithstanding subsections (a) and (b) of this section or any other provision of this chapter, the receiver for an insurer-member subject to a delinquency proceeding may not void a transfer made to a federal home loan bank in the ordinary course of business within four months of the commencement of the delinquency proceedings or which received prior approval of the receiver: Provided, That a transfer may be voided under this section if the transfer was made with actual intent to hinder, delay or defraud the insurer-member, a receiver appointed for the insurer-member or existing or future creditors.

(2) Following the appointment of a receiver for an insurer-member and upon request of the receiver, the federal home loan bank shall, within ten days of the request, provide a process and establish timing for:

(A) The release of collateral that exceeds the lending value, as determined in accordance with the advance agreement with the federal home loan bank, required to support secured

obligations remaining after any repayment of advances;

(B) The release of any collateral remaining in the federal home loan bank's possession following repayment of all outstanding secured obligations in full;

(C) The payment of fees and the operation of deposits and other accounts with the federal home loan bank; and

(D) The possible redemption or repurchase of federal home loan bank stock or excess stock of any class that an insurer-member is required to own.

(3) Upon the request of the receiver for an insurer-member, the federal home loan bank shall provide any available options for the insurer-member to renew or restructure an advance to defer associated prepayment fees, to the extent that market conditions, the terms of the advance outstanding to the insurer-member, the applicable policies of the federal home loan bank and compliance with the Federal Home Loan Bank Act and corresponding regulations permit.

(4) Nothing in this subsection affects the receiver's rights pursuant to 12 C.F.R. § 1266.4 regarding advances to an insurer-member in delinquency proceedings.

(d) Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property; except where a bona fide purchaser or lienor has given less than fair equivalent value, the purchaser or lienor shall have a lien upon the property to the extent of the consideration actually given. Where a preference by way of lien or security title is voidable, the court may on due notice order the lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator.

(e) A transfer under this section is considered to have been made as follows:

(1) A transfer of property other than real property is made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

(2) A transfer of real property is made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(3) A transfer which creates an equitable lien is not perfected if there are available means by which a legal lien could be created.

(4) A transfer not perfected prior to the filing of a petition for liquidation is made immediately before the filing of the successful petition.

(5) The provisions of this subsection apply whether or not there are or were creditors who

might have obtained liens or persons who might have become bona fide purchasers.

(f) (1) A lien obtainable by legal or equitable proceedings upon a simple contract is one arising in the ordinary course of the proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution or like process, whether before, upon or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(2) A lien obtainable by legal or equitable proceedings becomes superior to the rights of a transferee, or a purchaser obtains rights superior to the rights of a transferee within the meaning of subsection (e) of this section, if the consequences follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. A lien does not, however, become superior and the purchase does not create superior rights for the purpose of subsection (e) of this section through any acts subsequent to the obtaining of the lien or subsequent to the purchase which require the agreement or concurrence of any third party or which require any further judicial action or ruling.

(g) A transfer of property for or on account of a new and contemporaneous consideration which is considered under subsection (e) of this section to be made or suffered after the transfer because of delay in perfecting it does not thereby become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or bona fide purchasers' rights are performed within twenty-one days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if the loan is actually made, or a transfer which becomes security for a future loan, has the same effect as a transfer for or on account of a new and contemporaneous consideration.

(h) If any lien that is voidable under subsection (b) of this section has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the filing of a petition under this article which results in a liquidation order, the indemnifying transfer or lien is also considered voidable.

(i) The property affected by any lien considered voidable under subsections (a), (b) and (h) of this section shall be discharged from the lien and that property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the liquidator, except that the court may on due notice order the lien to be preserved for the benefit of the estate and the court may direct that the conveyance be executed as may be proper or adequate to evidence the title of the liquidator.

(j) The circuit court has summary jurisdiction of any proceeding by the liquidator to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying

property in kind or for the avoidance of an indemnifying lien the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court, to the liquidator within reasonable times the court fixes.

(k) The liability of the surety under a releasing bond or other like obligation is discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the liquidator or where the property is retained under subsection (j) of this section to the extent of the amount paid to the liquidator.

(l) If a creditor has been preferred, and afterward in good faith gives the insurer further credit without security of any kind, for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from him or her.

(m) If an insurer, directly or indirectly, within four months before the filing of a successful petition for liquidation under this article, or at any time in contemplation of a proceeding to liquidate it, pays money or transfers property to an attorney-at-law for services rendered or to be rendered, the transactions may be examined by the court on its own motion or shall be examined by the court on petition of the liquidator and may be held valid only to the extent of a reasonable amount to be determined by the court and the excess may be recovered by the liquidator for the benefits of the estate provided that where the attorney is in a position of influence in the insurer or an affiliate thereof payment of any money or the transfer of any property to the attorney-at-law for services rendered or to be rendered shall be governed by the provision of subdivision (3), subsection (b) of this section.

(n) (1) Every officer, manager, employee, shareholder, member, subscriber, attorney or any other person acting on behalf of the insurer who knowingly participates in giving any preference when he or she has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference is personally liable to the liquidator for the amount of the preference. It is permissible to infer that there is a reasonable cause to so believe if the transfer was made within four months before the date of filing of this successful petition for liquidation.

(2) Every person receiving any property from the insurer or the benefit thereof as a preference voidable under subsections (a) and (b) of this section is personally liable therefor and is bound to account to the liquidator.

(3) Nothing in this subsection prejudices any other claim by the liquidator against any person.