

HB 2461

FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2015



ENROLLED

House Bill No. 2461

(By Delegate(s) Walters, McCuskey, Frich,
Azinger, Westfall, Moore, Skinner, Perry,
Perdue, Bates and E. Nelson)



Passed March 12, 2015

In effect ninety days from passage.

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E N R O L L E D

H. B. 2461

(BY DELEGATE(S) WALTERS, MCCUSKEY, FRICH,
AZINGER, WESTFALL, MOORE, SKINNER, PERRY,
PERDUE, BATES AND E. NELSON)

[Passed March 12, 2015;
in effect ninety days from passage.]

AN ACT to amend and reenact §33-10-4 and §33-10-26 of the Code of West Virginia, 1931, as amended, all relating to delinquency proceedings of insurers; issuance of injunctions or orders following the commencement of a rehabilitation or liquidation proceeding of an insurer; and providing limitations on the avoidance of a transfer to a federal home loan bank in a liquidation proceeding of an insurer-member of the federal home loan bank.

Be it enacted by the Legislature of West Virginia:

That §33-10-4 and §33-10-26 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 10. REHABILITATION AND LIQUIDATION.

§33-10-4. Injunctions and other orders.

1 (a) Upon application by the commissioner for an order under
2 this article:

3 (1) The court may without notice issue an injunction
4 restraining the insurer, its officers, directors, stockholders,
5 members, subscribers, agents and all other persons from the
6 transaction of its business or the waste or disposition of its
7 property until further order of the court.

8 (2) The court may at any time during a proceeding under this
9 article issue other injunctions or orders as may be considered
10 necessary to prevent interference with the commissioner or the
11 proceeding, or waste of the assets of the insurer, or the
12 commencement or prosecution of any actions, or the obtaining
13 of preferences, judgments, attachments or other liens, or the
14 making of any levy against the insurer or against its assets or any
15 part thereof.

16 (3) The court may order any managing general agent or
17 attorney-in-fact to release to the commissioner any books,
18 records, accounts, documents or other writings relating to the
19 business of such person: *Provided*, That any of the same or the
20 property of an agent or attorney shall be returned when no longer
21 necessary to the commissioner or at any time the court after
22 notice and hearing shall so direct.

23 (b) Any person having possession of and refusing to deliver
24 any of the books, records or assets of an insurer against whom a
25 seizure order has been issued by the court is guilty of a
26 misdemeanor and, shall be punished by a fine not exceeding
27 \$1,000 or confined in jail not more than one year, or both fined
28 and confined.

29 (c) Whenever the commissioner makes any seizure as
30 provided in section three of this article, it is the duty of the
31 sheriff of any county of this state, and of the police department
32 of any municipality therein, to furnish the commissioner, upon
33 demand, with deputies, patrolmen or officers necessary to assist
34 the commissioner in making and enforcing the seizure.

35 (d) Notwithstanding any other provision of law, no bond is
36 required of the commissioner as a prerequisite for the issuance
37 of any injunction or restraining order pursuant to this section.

38 (e) Notwithstanding subsections (a) through (d) of this
39 section or any other provision of this chapter, the
40 commencement of a delinquency proceeding with respect to an
41 insurer-member does not operate as a stay, injunction or
42 prohibition of the exercise by a federal home loan bank of its
43 rights regarding collateral pledged by the insurer-member.

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

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

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

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

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

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

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

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

44 (A) The release of collateral that exceeds the lending value,
45 as determined in accordance with the advance agreement with
46 the federal home loan bank, required to support secured
47 obligations remaining after any repayment of advances;

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

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

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

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

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

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

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

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

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

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

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

93 (5) The provisions of this subsection apply whether or not
94 there are or were creditors who might have obtained liens or
95 persons who might have become bona fide purchasers.

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

104 (2) A lien obtainable by legal or equitable proceedings
105 becomes superior to the rights of a transferee, or a purchaser
106 obtains rights superior to the rights of a transferee within the
107 meaning of subsection(e) of this section, if the consequences
108 follow only from the lien or purchase itself, or from the lien or

109 purchase followed by any step wholly within the control of the
110 respective lienholder or purchaser, with or without the aid of
111 ministerial action by public officials. A lien does not, however,
112 become superior and the purchase does not create superior rights
113 for the purpose of subsection(e) of this section through any acts
114 subsequent to the obtaining of the lien or subsequent to the
115 purchase which require the agreement or concurrence of any
116 third party or which require any further judicial action or ruling.

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

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

137 (i) The property affected by any lien considered voidable
138 under subsections (a), (b) and (h) of this section shall be
139 discharged from the lien and that property and any of the
140 indemnifying property transferred to or for the benefit of a surety
141 shall pass to the liquidator, except that the court may on due

142 notice order the lien to be preserved for the benefit of the estate
143 and the court may direct that the conveyance be executed as may
144 be proper or adequate to evidence the title of the liquidator.

145 (j) The circuit court has summary jurisdiction of any
146 proceeding by the liquidator to hear and determine the rights of
147 any parties under this section. Reasonable notice of any hearing
148 in the proceeding shall be given to all parties in interest,
149 including the obligee of a releasing bond or other like obligation.
150 Where an order is entered for the recovery of indemnifying
151 property in kind or for the avoidance of an indemnifying lien the
152 court, upon application of any party in interest, shall in the same
153 proceeding ascertain the value of the property or lien and if the
154 value is less than the amount for which the property is indemnity
155 or than the amount of the lien, the transferee or lienholder may
156 elect to retain the property or lien upon payment of its value, as
157 ascertained by the court, to the liquidator within reasonable
158 times the court fixes.

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

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

171 (m) If an insurer, directly or indirectly, within four months
172 before the filing of a successful petition for liquidation under this
173 article, or at any time in contemplation of a proceeding to

174 liquidate it, pays money or transfers property to an attorney-at-
175 law for services rendered or to be rendered, the transactions may
176 be examined by the court on its own motion or shall be examined
177 by the court on petition of the liquidator and may be held valid
178 only to the extent of a reasonable amount to be determined by
179 the court and the excess may be recovered by the liquidator for
180 the benefits of the estate provided that where the attorney is in a
181 position of influence in the insurer or an affiliate thereof
182 payment of any money or the transfer of any property to the
183 attorney-at-law for services rendered or to be rendered shall be
184 governed by the provision of subdivision (3), subsection (b) of
185 this section.

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

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

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

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

John B. Miller
Chairman, House Committee

Gregory B. ...
Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Allyce J. ...
Clerk of the House of Delegates

Clark S. ...
Clerk of the Senate

Jeffery ...
Speaker of the House of Delegates

William ...
President of the Senate

The within *is approved* this the *1st*
day of *April* 2015.

Earl Ray Tomblin
Governor

PRESENTED TO THE GOVERNOR

MAR 18 2015

Time 5:30 pm