

Senate Bill No. 313

(By Senators Nohe, Blair, Carmichael, Gaunch, D. Hall, M. Hall, Laird, Palumbo and Stollings)

[Introduced January 26, 2015; referred to the Committee on Banking and Insurance; and then to the Committee on the Judiciary.]

A BILL 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 commencement of rehabilitation or liquidation proceeding of an insurer; and providing limitations on avoidance of transfer to federal home loan bank in liquidation proceeding of insurer-member of 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.

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

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

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

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

11 (b) Any person having possession of and refusing to deliver any of the books, records or
12 assets of an insurer against whom a seizure order has been issued by the court ~~shall be~~ is guilty of
13 a misdemeanor and, ~~punishable~~ shall be punished by a fine not exceeding \$1,000 or ~~imprisoned~~
14 confined in jail not more than one year, or both ~~fine and imprisonment~~ fined and confined.

15 (c) Whenever the commissioner makes any seizure as provided in section three of this article,
16 it ~~shall be~~ is the duty of the sheriff of any county of this state, and of the police department of any
17 municipality therein, to furnish the commissioner, upon demand, with ~~such~~ deputies, patrolmen or
18 officers ~~as may be~~ necessary to assist the commissioner in making and enforcing ~~any~~ the seizure.

19 (d) Notwithstanding any other provision of law, no bond ~~shall be~~ is required of the
20 commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this
21 section.

22 (e) Notwithstanding subsections (a) through (d) of this section or any other provision of this

1 chapter, the commencement of a delinquency proceeding with respect to an insurer-member does
2 not operate as a stay, injunction or prohibition of the exercise by a federal home loan bank of its
3 rights regarding collateral pledged by the insurer-member.

4 **§33-10-26. Voidable preferences and liens.**

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

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

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

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

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

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

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

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

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

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

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

20 (3) Upon the request of the receiver for an insurer-member, the federal home loan bank shall
21 provide any available options for the insurer-member to renew or restructure an advance to defer
22 associated prepayment fees, to the extent that market conditions, the terms of the advance
23 outstanding to the insurer-member, the applicable policies of the federal home loan bank and

1 compliance with the Federal Home Loan Bank Act and corresponding regulations permit.

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

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

10 ~~(d)~~ (e) A transfer under this section ~~will be~~ is considered to have been made as follows:

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

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

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

19 (4) A transfer not perfected prior to the filing of a petition for liquidation ~~shall be deemed~~
20 ~~to be~~ is made immediately before the filing of the successful petition.

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

23 ~~(e)~~ (f) (1) A lien obtainable by legal or equitable proceedings upon a simple contract is one

1 arising in the ordinary course of the proceedings upon the entry or docketing of a judgment or decree,
2 or upon attachment, garnishment, execution or like process, whether before, upon or after judgment
3 or decree and whether before or upon levy. It does not include liens which under applicable law are
4 given a special priority over other liens which are prior in time.

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

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

22 ~~(g)~~ (h) If any lien ~~deemed~~ that is voidable under subsection (b) of this section has been
23 dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified

1 directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before
2 the filing of a petition under this article which results in a liquidation order, the indemnifying transfer
3 or lien ~~shall also be~~ is also considered voidable.

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

10 ~~(f)~~ (j) The circuit court ~~shall have~~ has summary jurisdiction of any proceeding by the
11 liquidator to hear and determine the rights of any parties under this section. Reasonable notice of
12 any hearing in the proceeding shall be given to all parties in interest, including the obligee of a
13 releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying
14 property in kind or for the avoidance of an indemnifying lien the court, upon application of any party
15 in interest, shall in the same proceeding ascertain the value of the property or lien and if the value
16 is less than the amount for which the property is indemnity or than the amount of the lien, the
17 transferee or lienholder may elect to retain the property or lien upon payment of its value, as
18 ascertained by the court, to the liquidator within ~~such~~ reasonable times as the court ~~shall fix~~ fixes.

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

23 ~~(k)~~ (l) If a creditor has been preferred, and afterward in good faith gives the insurer further

1 credit without security of any kind, for property which becomes a part of the insurer's estate, the
2 amount of the new credit remaining unpaid at the time of the petition may be set off against the
3 preference which would otherwise be recoverable from him or her.

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

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

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

23 (3) Nothing in this subsection ~~shall prejudice~~ prejudices any other claim by the liquidator

1 against any person.

NOTE: The purpose of this bill is to clarify that the commencement of a delinquency proceeding of an insurer-member does not operate as a stay of the exercise by a federal home loan bank of its rights regarding collateral pledged by the insurer-member to secure advances, and to provide limitations on the voidance by the receiver of certain transfers made to a federal home loan bank.

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