

H. B. 2461

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[Introduced January 28, 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 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 ~~shall be~~ is guilty of a
26 misdemeanor and, ~~punishable~~ shall be punished by a fine not
27 exceeding \$1,000 or ~~imprisoned~~ confined in jail not more than
28 one year, or both ~~fine and imprisonment~~ fined and confined.

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

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

40 (e) Notwithstanding subsections (a) through (d) of this
41 section or any other provision of this chapter, the
42 commencement of a delinquency proceeding with respect to an
43 insurer-member does not operate as a stay, injunction or

44 prohibition of the exercise by a federal home loan bank of its
45 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 ~~shall be deemed~~ are
10 preferences if made or suffered within one year before the filing
11 of the successful petition for rehabilitation, or within two years
12 before the filing of the successful petition for liquidation,
13 whichever time is 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 ~~(d)~~ (e) A transfer under this section ~~will be~~ is considered to
78 have been made as follows:

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

84 (2) A transfer of real property ~~shall be deemed to be~~ is made
85 or suffered when it becomes so far perfected that no subsequent

86 bona fide purchaser from the insurer could obtain rights superior
87 to the rights of the transferee.

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

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

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

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

105 (2) A lien obtainable by legal or equitable proceedings ~~could~~
106 ~~become~~ becomes superior to the rights of a transferee, or a
107 purchaser ~~could obtain~~ obtains rights superior to the rights of a
108 transferee within the meaning of subsection ~~(d)~~ (e) of this

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

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

131 the same effect as a transfer for or on account of a new and
132 contemporaneous consideration.

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

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

150 ~~(i)~~ (j) The circuit court ~~shall have~~ has summary jurisdiction
151 of any proceeding by the liquidator to hear and determine the
152 rights of any parties under this section. Reasonable notice of any
153 hearing in the proceeding shall be given to all parties in interest,

154 including the obligee of a releasing bond or other like obligation.
155 Where an order is entered for the recovery of indemnifying
156 property in kind or for the avoidance of an indemnifying lien the
157 court, upon application of any party in interest, shall in the same
158 proceeding ascertain the value of the property or lien and if the
159 value is less than the amount for which the property is indemnity
160 or than the amount of the lien, the transferee or lienholder may
161 elect to retain the property or lien upon payment of its value, as
162 ascertained by the court, to the liquidator within ~~such~~ reasonable
163 times as the court ~~shall fix~~ fixes.

164 (†) (k) The liability of the surety under a releasing bond or
165 other like obligation ~~shall be~~ is discharged to the extent of the
166 value of the indemnifying property recovered or the
167 indemnifying lien nullified and avoided by the liquidator or
168 where the property is retained under subsection (†) (j) of this
169 section to the extent of the amount paid to the liquidator.

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

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

191 ~~(m)~~ (n) (1) Every officer, manager, employee, shareholder,
192 member, subscriber, attorney or any other person acting on
193 behalf of the insurer who knowingly participates in giving any
194 preference when he or she has reasonable cause to believe the
195 insurer is or is about to become insolvent at the time of the
196 preference ~~shall be~~ is personally liable to the liquidator for the
197 amount of the preference. It is permissible to infer that there is
198 a reasonable cause to so believe if the transfer was made within

199 four months before the date of filing of this successful petition
200 for liquidation.

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

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

