

As Introduced

125th General Assembly
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H. B. No. 282

Representatives Flowers, Martin, Seitz, Setzer, Allen

A BILL

To amend section 3903.28 of the Revised Code to
lengthen the time period during which the
liquidator of an insolvent insurance company may
void certain preferential transfers of property by
the company to a creditor.

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 3903.28 of the Revised Code be
amended to read as follows:

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Sec. 3903.28. (A)(1) A preference is a transfer of any of the
property of an insurer or of an interest in 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 two years before the ~~filing of a successful~~ complaint for
~~liquidation under sections 3903.01 to 3903.59 of the Revised Code,~~
~~the effect of which transfer may be to enable the creditor to~~
~~obtain a greater percentage of his debt than another creditor of~~
~~the same class would receive. If a liquidation order is entered~~
~~while the insurer is already subject to a rehabilitation order,~~
~~then such transfer shall be deemed preferences if made or suffered~~
~~within one year before the filing of the successful complaint for~~
~~rehabilitation, or within two years before the filing of the~~

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~~successful complaint for liquidation, whichever time is shorter~~ 21
~~date that enables the creditor to receive more than the creditor~~ 22
~~would receive if the insurer was liquidated under this chapter,~~ 23
~~the transfer had not been made, and the creditor received payment~~ 24
~~of the debt to the extent provided by the provisions of this~~ 25
~~chapter.~~ 26

(2) Any preference may be avoided by the liquidator if any of 27
the following apply: 28

(a) The insurer was insolvent at the time of the transfer; 29

(b) The transfer was made within ~~four months~~ one hundred 30
twenty days before the ~~filing of the~~ complaint date; 31

(c) The creditor receiving it or to be benefited thereby or 32
~~his~~ the creditor's agent acting with reference thereto had, at the 33
time when the transfer was made, reasonable cause to believe that 34
the insurer was insolvent or was about to become insolvent; 35

(d) The creditor receiving it was ~~an officer, or~~ any of the 36
following: 37

(i) An officer or director of the insurer; 38

(ii) A person, including but not limited to an employee or 39
attorney ~~or other person,~~ who was in fact in a position of 40
~~comparable influence in~~ to effect a level of control over the 41
actions of the insurer comparable to that of an officer or 42
director whether or not ~~he~~ the person held such position, ~~or any~~ 43
excluding employees of the department of insurance and any person 44
retained or appointed by the department to assist in the 45
examination, supervision, or other regulation or monitoring of the 46
insurer; 47

(iii) A shareholder holding directly or indirectly more than 48
five per cent of any class of any equity security issued by the 49
insurer, ~~or any;~~ 50

(iv) Any other person, firm, corporation, association, or 51
aggregation of persons with whom the insurer did not deal at arm's 52
length. 53

(3) Where the preference is voidable, the liquidator may 54
recover the property or the value of the property from the initial 55
transferee, and if it the property has been transferred or 56
converted, it the liquidator may recover the property or the 57
value of the property from any person who has received ~~or~~ 58
~~converted~~ the property, except that a bona fide purchaser or 59
lienor ~~who has given consideration of less than fair equivalent~~ 60
~~value~~ has a lien upon the property to the extent of the 61
consideration actually given. Where a preference by way of lien or 62
security title is voidable, ~~the court may on due notice order the~~ 63
such lien or title ~~to be~~ is preserved for the benefit of the 64
estate, in which event the lien or title shall pass to the 65
liquidator. 66

(4) The liquidator may not avoid a transfer under this 67
section as provided by the following: 68

(a) To the extent that the transfer was intended, by both the 69
insurer and the creditor to or for whose benefit the transfer was 70
made, to be a contemporaneous exchange for new value given to the 71
insurer and was in fact a substantially contemporaneous exchange; 72

(b) To the extent that the transfer was in payment of a debt 73
incurred by the insurer in the ordinary course of business or 74
financial affairs of the insurer and the transferee and the 75
transfer both was made in the ordinary course of business or 76
financial affairs of the insurer and the transferee and was made 77
according to ordinary business terms; 78

(c) If the transfer was made to or for the benefit of a 79
creditor, to the extent that after the transfer the creditor gave 80
new value to or for the benefit of the insurer not secured by an 81

otherwise avoidable security interest, on account of which new 82
value the insurer did not make an otherwise unavoidable transfer 83
to or for the benefit of such creditor. 84

(B)(1) A transfer of property other than real property is 85
deemed to be made or suffered when it becomes so far perfected 86
that no subsequent lien obtainable by legal or equitable 87
proceedings on a simple contract can become superior to the rights 88
of the transferee. 89

(2) A transfer of real property is deemed to be made or 90
suffered when it becomes so far perfected that no subsequent bona 91
fide purchaser from the insurer can obtain rights superior to the 92
rights of the transferee. 93

(3) A transfer which creates an equitable lien is not deemed 94
to be perfected if there are available means by which a legal lien 95
can be created. 96

(4) A transfer not perfected prior to the ~~filing of a~~ 97
complaint ~~for liquidation~~ date is deemed to be made immediately 98
before the ~~filing of the successful~~ complaint date. 99

(5) The provisions of division (B) of this section apply 100
whether or not there are or were creditors who might have obtained 101
liens or persons who might have become bona fide purchasers. 102

(C)(1) A lien obtainable by legal or equitable proceedings 103
upon a simple contract is one arising in the ordinary course of 104
such proceedings upon the entry or docketing of a judgment or 105
decree, or upon attachment, garnishment, execution, or like 106
process, whether before, upon, or after judgment or decree and 107
whether before or upon levy. It does not include liens which under 108
applicable law are given a special priority over other liens which 109
are prior in time. 110

(2) A lien obtainable by legal or equitable proceedings is 111

superior to the rights of a transferee, or a purchaser may obtain 112
rights superior to the rights of a transferee within the meaning 113
of division (B) of this section, if such consequences follow only 114
from the lien or purchase itself, or from the lien or purchase 115
followed by any step wholly within the control of the respective 116
lienholder or purchaser, with or without the aid of ministerial 117
action by public officials. Such a lien is not, however, superior 118
and such a purchase does not create superior rights for the 119
purpose of division (B) of this section through any acts 120
subsequent to the obtaining of such a lien or subsequent to such a 121
purchase which require the agreement or concurrence of any third 122
party or which require any further judicial action or ruling. 123

(D) A transfer of property for or on account of a new and 124
contemporaneous consideration that is deemed under division (B) of 125
this section to be made or suffered after the transfer because of 126
delay in perfecting it does not thereby become a transfer for or 127
on account of an antecedent debt if any acts required by the 128
applicable law to be performed in order to perfect the transfer as 129
against liens or bona fide purchasers' rights are performed within 130
twenty-one days or any period expressly allowed by the law, 131
whichever is less. A transfer to secure a future loan, if such a 132
loan is actually made, or a transfer which becomes security for a 133
future loan, has the same effect as a transfer for or on account 134
of a new and contemporaneous consideration. 135

(E) If any lien deemed voidable under division (A)(2) of this 136
section has been dissolved by the furnishing of a bond or other 137
obligation, the surety on which has been indemnified directly or 138
indirectly by the transfer of or the creation of a lien upon any 139
property of an insurer before the ~~filing of a complaint under~~ 140
~~sections 3903.01 to 3903.59 of the Revised Code which results in a~~ 141
~~liquidation order~~ date, the indemnifying transfer or lien is also 142
deemed voidable. 143

(F) The property affected by any lien deemed voidable under 144
divisions (A) and (E) of this section is discharged from such 145
lien, and that property and any of the indemnifying property 146
transferred to or for the benefit of a surety passes to the 147
liquidator, except that the court may on due notice order any such 148
lien to be preserved for the benefit of the estate and the court 149
may direct that such conveyance be executed as may be proper or 150
adequate to evidence the title of the liquidator. 151

(G) The Franklin county court of common pleas has ~~exclusive~~ 152
jurisdiction of any proceeding by the liquidator to hear and 153
determine the rights of any parties under this section. Reasonable 154
notice of any hearing in the proceeding shall be given to all 155
parties in interest, including the obligee of a releasing bond or 156
other like obligation. Where an order is entered for the recovery 157
of indemnifying property in kind or for the avoidance of an 158
indemnifying lien, the court, ~~upon motion of any party in~~ 159
~~interest, shall~~ may in the same proceeding ascertain the value of 160
the property or lien, and if the value is less than the amount for 161
which the property is indemnity or than the amount of the lien, 162
the transferee or lienholder may elect to retain the property or 163
lien upon payment of its value, as ascertained by the court, to 164
the liquidator, within such reasonable times as the court shall 165
fix. 166

(H) The liability of a surety under a releasing bond or other 167
like obligation shall be discharged to the extent of the value of 168
the indemnifying property recovered or the indemnifying lien 169
nullified and avoided by the liquidator, or where the property is 170
retained under division (G) of this section to the extent of the 171
amount paid to the liquidator. 172

~~(I) If a creditor has been preferred, and afterward in good 173
faith gives the insurer further credit without security of any 174
kind, for property which becomes a part of the insurer's estate, 175~~

~~the amount of the new credit remaining unpaid at the time of the~~ 176
~~complaint may be set off against the preference which would~~ 177
~~otherwise be recoverable from him.~~ 178

~~(J)~~ If an insurer shall, directly or indirectly, within ~~four~~ 179
~~months~~ one hundred twenty days before the ~~filing of a successful~~ 180
~~complaint for liquidation under sections 3903.01 to 3903.59 of the~~ 181
~~Revised Code~~ date, or at any time in contemplation of a proceeding 182
to liquidate it, pay money or transfer property to an 183
attorney-at-law for services rendered or to be rendered, the 184
transaction may be examined by the court on its own motion or 185
shall be examined by the court on motion of the liquidator and 186
shall be held valid only to the extent of a reasonable amount to 187
be determined by the court, and the excess may be recovered by the 188
liquidator for the benefit of the estate provided that where the 189
attorney is in a position of influence in the insurer or an 190
affiliate thereof, payment of any money or the transfer of any 191
property to the attorney-at-law for services rendered or to be 192
rendered shall be governed by the provisions of division (A)(2) of 193
this section. 194

~~(K)(1) Every officer, manager, employee, shareholder, member,~~ 195
~~subscriber, attorney, or any other person acting on behalf of the~~ 196
~~insurer who knowingly participates in giving any preference when~~ 197
~~he has reasonable cause to believe the insurer is or is about to~~ 198
~~become insolvent at the time of the preference shall be personally~~ 199
~~liable to the liquidator for the amount of the preference. It~~ 200
~~shall be presumed that there is reasonable cause to so believe if~~ 201
~~the transfer was made within four months before the date of filing~~ 202
~~of the successful complaint for liquidation.~~ 203

~~(2)~~(J) As to every transfer subject to avoidance under this 204
section: 205

(1) Every person receiving any property from the insurer or 206
the benefit thereof as a preference voidable under division (A) of 207

this section shall be personally liable for the property and shall 208
be bound to account to the liquidator. 209

~~(3)~~(2) The liquidator has the burden of proving that a 210
transfer under division (A)(2) of this section is voidable, and 211
the person against which recovery or voidability is sought has the 212
burden of proving that a transfer under division (A)(4) of this 213
section is not voidable. 214

(3) The fact that the insurer was under examination, 215
supervision, or other regulatory oversight by the department of 216
insurance, or that the department may have acquiesced in or 217
approved any payments made by the insurer, does not effect or 218
otherwise create a defense to avoidance of a transfer voidable 219
under this section. 220

(K) Nothing in this division shall be construed to prejudice 221
any other claim by the liquidator against any person. 222

(L) As used in this section: 223

(1) "Complaint date" means the date on which a complaint is 224
filed by the superintendent of insurance seeking the liquidation 225
of an insurer, if the complaint results in an order of 226
liquidation. If the insurer is placed in rehabilitation, which 227
rehabilitation is later converted to liquidation, the "complaint 228
date" is the date on which the original complaint seeking 229
rehabilitation was filed. 230

(2) "New value" means money or money's worth in goods, 231
services, new credit, or the release by a transferee of property 232
previously transferred to the transferee in a transaction that is 233
neither void nor voidable by the liquidator under any applicable 234
law, including the proceeds of the transferred property, but does 235
not include an obligation substituted for an existing obligation. 236

Section 2. That existing section 3903.28 of the Revised Code 237
is hereby repealed. 238