Bill Analysis

Greg Schwab *Legislative Service Commission*

H.B. 282

125th General Assembly
(As Introduced)

Reps. Flowers, Martin, Seitz, Setzer, Allen

BILL SUMMARY

- Lengthens the time period during which the liquidator of an insolvent insurance company is allowed to void certain preferential transfers of company assets to creditors.

- Identifies certain transfers of insurance company property that may not be voided by a liquidator but allows a liquidator to void certain other types of property transfers.

- Terminates the Franklin County Court of Common Pleas' exclusive jurisdiction over proceedings involving a liquidator of an insolvent insurance company.

- Terminates the personal liability imposed on persons acting on behalf of an insurance company for the amount of the preference given by the insurance company.

CONTENT AND OPERATION

Preferential transfers

(sec. 3903.28)

Antecedent debts and preferences

(sec. 3903.28(A)(1) and (L))

A provision of Ohio insurance law governing the rehabilitation and liquidation of insurance companies currently identifies a "preference" as the transfer of an insurance company's property to or for the benefit of a creditor, for or on the account of an antecedent debt that the insurance company incurred within one year prior to the filing of a successful complaint for the insurance company's liquidation. If a liquidation order is entered while an insurance company is subject to a rehabilitation order, a transfer is deemed to be a preference if the debt was incurred within one year prior to the filing of the successful complaint for the insurance company's rehabilitation, or within two years prior to the filing of the successful complaint for liquidation, whichever is shorter.

The bill expands the definition of preferences to include not only the transfer of an insurance company's property, but also the transfer of any *interest* in an insurance company's property, to or for the benefit of a creditor, for or on account of a timely antecedent debt. The bill also increases from one to potentially up to two years the length of time prior to a complaint for liquidation or rehabilitation during which an insurance company's incurrence of a debt qualifies as an antecedent debt for the purpose of determining whether a transfer of the insurance company's property to the creditor on that debt is a preferential transfer. Under the bill, a debt made or suffered by an insurance company within two years before the *complaint date* qualifies as an antecedent debt for purposes of determining whether a preference occurred. A "complaint date" is defined as either the date on which a complaint is filed by the Superintendent of Insurance seeking the liquidation of an insurance company, if the complaint results in an order of liquidation, or, if an insurance company is in rehabilitation and that rehabilitation is later converted to an order of liquidation, the "complaint date" is the date on which the original complaint for rehabilitation was filed. The bill replaces the current phrase, "the filing of a successful complaint" with "the complaint date" in several places in section 3903.28 of the Revised Code, including in divisions (A)(1), (B)(4), (E), and (J), to indicate a reference date.

Under existing law, an insurance company's transfer of property currently is not a "preference" unless the effect of the transfer "is to enable the creditor to obtain a greater percentage of [their] debt than another creditor of the same class would receive." The bill expands on this language and establishes a three-part test to provide that an insurance company's transfer of property is not a preference unless (1) the transfer enables the creditor to receive more than the creditor would receive if the creditor instead did not receive the property, (2) the insurance company is liquidated under Chapter 3903. of the Revised Code, and (3) the creditor receives payment only to the extent otherwise provided by the insurance company liquidation provisions of Chapter 3903. of the Revised Code.

Court proceedings

(sec. 3903.28(G))

The insurance company rehabilitation and liquidation provisions of law currently grant the Franklin County Court of Common Pleas exclusive jurisdiction to hear and determine the rights of parties in any proceeding by a liquidator regarding preferences. The bill ends the Franklin County Common Pleas Court's exclusive jurisdiction over these proceedings thereby allowing another common pleas court to hear a proceeding when the Franklin County court does not have venue. Also, under the bill, if the common pleas court hearing the proceeding enters an order for the recovery of indemnifying property or an order for the avoidance of an indemnifying lien, the court may in the same proceeding determine the value of the property or lien. Current law permits the court to determine the value of the property or lien *only* upon a motion of a party in interest.

Nullifying a preference; transfers that may not be avoided

(sec. 3903.28(A)(2) and (A)(4))

Continuing law provides that preferences received by certain types of creditors may be "avoided" by a liquidator altogether. Currently, the Revised Code allows a preference to be avoided if the creditor is an officer of the insurance company, or a person, including but not limited to an employee or attorney, who is in a position of influence comparable to that of an officer of the insurance company. The bill also allows preferences to be avoided if the creditor is a director of the insurance company or a person in a position to effect a level of control over the actions of the insurance company comparable to that of a director, but excludes employees of the Department of Insurance and persons retained or appointed by the Department to assist in the examination, supervision, or other regulation or monitoring of the insurance company. Under continuing law, transfers received by large shareholders or by other persons not dealing at arm's length with the insurer may also be avoided by a liquidator. Under the bill, the liquidator has the burden of proving that preferences are voidable.

The bill provides that the following transfers may *not* be avoided by a liquidator:

(1) Transfers intended by both the insurance company and the creditor, to or for whose benefit a transfer is made, to be a contemporaneous exchange for *new value* given to the insurance company, and that are in fact a substantially contemporaneous exchange. "New value," for purposes of the bill, is defined as money or money's worth in goods, services, new credit, or the release by a

transferee of property previously transferred to the transferee in a transaction that is neither void nor voidable by the liquidator under any applicable law, including the proceeds of the transferred property, but does not include an obligation substituted for an existing obligation.

(2) Transfers made in payment of a debt incurred by the insurance company in the ordinary course of business or financial affairs of the insurance company and the transferee, when the transfer both is made in the ordinary course of business or financial affairs of the insurance company and the transferee and is made according to ordinary business terms.

(3) Transfers made to or for the benefit of a creditor, to the extent that after the transfer the creditor gives new value to or for the benefit of the insurance company not secured by an otherwise avoidable security interest, on account of which new value the insurance company does not make an otherwise unavoidable transfer to or for the benefit of the creditor.

The person receiving the transfer has the burden of proving, in these three circumstances, that the transfer is not voidable.

A payment or other transfer made by an insurance company while under examination, supervision, or other regulatory oversight by the Department of Insurance, or made with the approval or acquiescence of the Department, does not effect or create a defense to the avoidance of a transfer under the Revised Code.

Recovery of property or the value of property by a liquidator

(sec. 3903.28(A)(3))

When a preference is voidable, the bill allows a liquidator to recover the value of the property from any person who receives the property, except that bona fide purchasers and lienors retain a lien upon the property to the extent of consideration given. Continuing law provides for the recovery of the property itself. However, the Revised Code currently only provides for the recovery of the value of property, rather than the property itself, when the property has been converted, for example, by an unauthorized seizure of the property. The liquidator, in that circumstance, may recover the value of the property from either the person who converted the property or the person who received the property.

When a preference made by means of a lien or security title is voidable, existing law currently permits a court, upon due notice, to order the lien or title to be preserved for the benefit of the estate. The bill stipulates that when a preference made by means of a lien or security title is voidable, the lien or title is *automatically* preserved for the benefit of the estate.

Personal liability no longer imposed on persons acting on behalf of an insurance company granting a preference

(sec. 3903.28(K), prior to repeal)

Under the bill, persons acting on behalf of an insurance company, who participate in the grant of a preference, are not personally liable to a liquidator for the amount of the preference given by the insurance company. Current law holds that officers, managers, employees, shareholders, members, subscribers, attorneys, and any other person acting on behalf of an insurance company are personally liable to the liquidator for the amount of a preference granted by an insurance company, if the person knowingly participates in the grant of the preference when they have reasonable cause to believe that the insurance company is insolvent or is about to become insolvent. "Reasonable cause" is presumed to exist if the preferential transfer is made within four months (see **COMMENT**) prior to the date of the filing of a successful complaint for liquidation.

Set offs

(sec. 3903.28(I))

The bill repeals a provision allowing a set off from a preference that may otherwise be recoverable from a creditor. Under the provision being repealed, if a creditor receives a preferential transfer, and afterward gives the insurance company further credit in good faith without security of any kind for property which becomes a part of the insurance company's estate, the amount of the new credit remaining unpaid at the time of the complaint may be set off against the preference.

COMMENT

The bill changes two references to "four month" time periods currently in section 3903.28 of the Revised Code to "one hundred twenty days."

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	09-18-03	p. 1074

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