Greg Schwab *Legislative Service Commission*

Sub. H.B. 282

125th General Assembly
(As Reported by H. Insurance)

Reps. Flowers, Martin, Seitz, Setzer, Allen, G. Smith, Daniels, Driehaus, Faber, Fessler, Gibbs, Hughes, Koziura, T. Patton, Seaver, Sferra, White, Wolpert, Woodard

BILL SUMMARY

- Authorizes the Superintendent of Insurance to create the Medical Liability Underwriting Association, upon a finding of need, to provide medical liability insurance to physicians and hospitals.
- Redefines preferential transfer for purposes of insurer liquidation proceedings.
- Repeals the personal liability of individuals participating in a preferential transfer on behalf of an insurance company.
- Repeals a set off currently allowed to a creditor against any preferential transfer received from an insurer for credit granted in good faith to the insurer after the preferential transfer.
- Modifies the types of preferential transfers that may be avoided by the liquidator of an insurance company.
- Ends the Franklin County Court of Common Pleas' exclusive jurisdiction over insurer liquidation proceedings involving preferences.

TABLE OF CONTENTS

Medical Liability Underwriting Association 2
Introduction 2
Superintendent of Insurance may create Medical Liability Underwriting Association; liability and tax exemptions; definitions 3
Government of the Medical Liability Underwriting Association 4
Plan of operation 5

Association filings; examination of the Association's operations 6
Application for policies; terms and conditions for policies 6
Cancellation of policies issued by the Association 8
Grievances; appeals 9
Concurrent creation of Stabilization Reserve Fund 9
Medical Liability Fund 10
Dissolution; subsequent reactivation of the Association 11
Preferential transfers 12
Antecedent debts and preferences 12
Court proceedings 13
Avoidance of transfers 13
Recovery of property or the value of property by a liquidator 14
Personal liability repealed for persons acting on behalf of an insurance company granting a preference 15
Set off repealed 15

CONTENT AND OPERATION

Medical Liability Underwriting Association

(secs. 3929.62 to 3929.70, inclusive)

Introduction

Current law, sections 3929.71 to 3929.85 of the Revised Code, provides for the creation and operation of the "Joint Underwriting Association." The Joint Underwriting Association is no longer in operation and is being dissolved pursuant to section 3929.721 of the Revised Code, enacted in the year 1993. When in operation, the Joint Underwriting Association had the power, *inter alia*, to issue policies of medical malpractice insurance to applicant physicians and hospitals, and did so. All insurers writing medical malpractice insurance in Ohio were required to be members of the Joint Underwriting Association and to contribute money to its operation.

The bill provides the Superintendent of Insurance with the authority, upon a finding of need, to create the "Medical Liability Underwriting Association" to provide medical liability insurance to applicant physicians and hospitals. If created, the operation of the bill's Medical Liability Underwriting Association will be similar to the operation of the Joint Underwriting Association.

Superintendent of Insurance may create Medical Liability Underwriting Association; liability and tax exemptions; definitions

(secs. 3929.62, 3929.63, 3929.68, and 3929.70)

The bill grants the Superintendent of Insurance the authority to create the Medical Liability Underwriting Association (hereafter, "MLUA"), a nonprofit, unincorporated, underwriting association, to provide one or more classes of medical liability insurance (a.k.a. "medical malpractice insurance"), as needed, to physicians and hospitals in Ohio. The Superintendent may create the MLUA by rule, under the Administrative Procedure Act (R.C. Chapter 119.), upon the Superintendent's finding that both of the following exist:

(1) A substantial number of physicians or hospitals applying for a class or classes of medical liability insurance, which applicants are insurable risks, have not been placed with insurers authorized to write medical liability insurance in Ohio. "Insurable risks" are physicians and hospitals that are licensed, certified, or accredited as required by the Revised Code.

(2) The physicians' or hospitals' inability to obtain a class or classes of medical liability insurance threatens the availability of health care for one or more groups of individuals in Ohio.

If created by the Superintendent, the MLUA has the authority to:

(1) Issue or cause to be issued policies of medical liability insurance to physicians and hospitals, including incidental coverages, subject to the terms, conditions, exclusions, and limits established by the MLUA's Board of Governors (*see* "***Government of the Medical Liability Underwriting Association***," below) with the Superintendent's approval;

(2) Underwrite the issued insurance and adjust and pay losses with respect thereto, or appoint service companies or associations to issue insurance and adjust and pay losses;

(3) Assume reinsurance;

(4) Cede reinsurance.

The bill grants immunity to the MLUA and its reserve fund, and its related Board of Governors, directors, agents, and employees; insurers and their employees; licensed agents and brokers; and to the Superintendent of Insurance and the Superintendent's authorized representatives and employees, for actions taken in connection with powers and duties assigned to them by the bill. Reports and communications made in connection with these actions are not public records.

The MLUA is exempt from all license fees, and income, franchise, premium, and privilege taxes levied or assessed by Ohio or any of its political subdivisions.

As used in the Medical Liability Insurance Law:

(1) "Applicant" means any physician or hospital licensed or accredited under the Revised Code.

(2) "Medical liability insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death, disease, or injury of any person as the result of negligence or malpractice in rendering professional service by any licensed physician or hospital, or any employee or agent acting within the scope of the employee's or agent's duties for a physician or hospital, which coverage may include coverage relating to the accreditation of medical professionals.

Government of the Medical Liability Underwriting Association

(sec. 3929.64)

The bill provides for the MLUA to be governed by a nine-member Board of Governors. The Board of Governors is empowered to employ, compensate, and prescribe the duties and powers of as many employees and consultants as are necessary to carry out the MLUA's purposes under the Revised Code. The members of the Board of Governors themselves serve without compensation, but are reimbursed for their actual and necessary expenses incurred in the discharge of their official duties.

Pursuant to the bill, seven members of the Board of Governors are appointees of the Superintendent of Insurance and two are appointees of the Governor. Additionally, the directors of the Stabilization Reserve Fund (*see* "***Concurrent creation of Stabilization Reserve Fund***," below) serve as *ex officio* members of the MLUA's Board of Governors.

Five of the Superintendent's seven appointees must be representatives of insurers licensed to write, and writing, liability insurance in Ohio, and two of these five appointees must represent *medical* liability insurers. The Superintendent's other two appointees must include a physician licensed in Ohio and a representative from an Ohio hospital.

The Governor's two appointees to the nine-member Board of Governors must include one insurance agent licensed and writing medical liability insurance in Ohio and one individual representing the interests of consumers. The consumer representative may not be a member of, or associated with, a health care provider

or profession, nor associated with an insurance company or a health insuring corporation licensed in Ohio.

The bill provides for three of the initial members of the Board of Governors to serve terms of one year, three to serve terms of two years, and three to serve terms of three years, all terms calculated from the date of the MLUA's creation. Thereafter, all members of the Board of Governors serve three-year terms, with the terms ending on the same day of the same month as the term it succeeds. Members may be reappointed to the Board of Governors. Member vacancies are filled in the same manner as the original appointment.

Plan of operation

(secs. 3929.65 and 3929.66(B))

The bill requires the Board of Governors of the MLUA to submit a proposed plan of operation to the Superintendent of Insurance within 45 days of the MLUA's creation (or its recreation, *see "**Dissolution; subsequent reactivation of the Association**,"* below) for the Superintendent's review. The proposed plan of operation must be consistent with the MLUA provisions of the bill. The Superintendent may adopt the plan of operation by rule promulgated in accordance with the Administrative Procedure Act; however, if the Superintendent does not adopt the plan within 30 days of its submission, the superintendent is responsible for formulating a plan of operation subsequent to the 30-day period, by rule, in the minimum time permitted by the Administrative Procedure Act.

The plan of operation is required to provide for the economic, fair, and nondiscriminatory administration of the MLUA and for the prompt and efficient provision of medical liability insurance. The bill requires certain provisions to be included in a plan of operation, without limiting the plan's contents. Provisions must be included for the:

(1) Establishment of necessary facilities;

(2) Management of the MLUA;

(3) Adoption of reasonable and objective underwriting standards;

(4) Acceptance and cession of reinsurance;

(5) Appointment of servicing insurance carriers or for the direct issuance of MLUA policies;

(6) Issuance of a binder that provides coverage, for which an applicant tenders an amount equal to the annual premium as estimated by the MLUA;

(7) Separate coding of all of the MLUA's policies, coding that allows for the compilation of records to be used for calculating adequate premium levels for each classification of risk;

(8) Establishment of minimum eligibility and underwriting standards for applicants for the MLUA's medical liability insurance.

At any time following the adoption of the plan of operation, the Board of Governors is empowered by the bill to propose amendments to the plan of operation. The proposals must be submitted to the Superintendent for the Superintendent's approval. The Superintendent also may propose amendments to the plan of operation. All amendments must be adopted as rules in accordance with the Administrative Procedure Act, and must be consistent with the MLUA provisions of the bill.

Association filings; examination of the Association's operations

(sec. 3929.69)

The MLUA is required by the bill to annually file a statement in the office of the Superintendent of Insurance containing information with respect to its transactions, condition, operations, and affairs during the preceding year. The statement must contain any information prescribed by, and must be in the form approved by, the Superintendent. The statements must be filed on or before the first day of March each year.

The bill authorizes the Superintendent or the Superintendent's designee to visit and examine the operation and experience of the MLUA at any time. The MLUA is required to give the Superintendent or the Superintendent's designee free access to all books, records, files, papers, and documents relating to the operation of the MLUA. The MLUA may summon, qualify, and allow the examination as witnesses, of all persons having knowledge of the MLUA's operation's, including the MLUA's officers, agents, and employees. The MLUA remains subject to examination by the Superintendent in accordance with the Superintendent's prescribed powers under Chapter 3901. of the Revised Code.

Application for policies; terms and conditions for policies

(secs. 3929.63(B), 3929.66 and 3929.661)

Any physician or hospital practicing or operating in Ohio that is seeking medical liability insurance may apply to the MLUA pursuant to the bill for the MLUA's medical liability insurance. Applications must be made on or after the effective date of the MLUA's plan of operation. An applicant may authorize a broker or agent to make the application on their behalf, or an application may be

made on behalf of a number of eligible applicants who are members of a medical society. If the MLUA determines an applicant meets the eligibility and underwriting standards found in the MLUA's plan of operation, and determines that there is no unpaid, uncontested premium due to the MLUA from the applicant for prior medical liability insurance, the MLUA is required to issue a one-year medical liability insurance policy to the applicant upon the MLUA's receipt of the full premium or the portion of the premium that is prescribed by the MLUA's plan of operation. The MLUA is under no obligation under the bill to issue a policy of medical liability insurance to an applicant that fails to meet the MLUA's eligibility and underwriting standards.

The bill allows coverage under a policy to be made available either as primary or excess protection, provided that limits of primary protection under one policy do not exceed $1,000,000 for each claim and $3,000,000 in any year, unless alternate limits are set forth in the MLUA's plan of operation.

The MLUA's Board of Governors is required by the bill to establish the rates, rating plans, rating rules, rating classifications, territories, and policy forms applicable to the MLUA's medical liability insurance, and related statistics, subject to the Property and Casualty Insurance Law, Chapter 3937. of the Revised Code. The establishment of these terms and conditions is subject to the Superintendent of Insurance's approval. The Superintendent must give due consideration to the past and prospective loss and expense experience for medical liability insurance sold by insurers in Ohio, to trends in the frequency and severity of losses, and to other relevant information the Superintendent believes to be required. The Superintendent must take all appropriate steps to make available to the MLUA the profit, loss, and expense experience of insurers currently or previously writing medical liability insurance in Ohio.

Rates, under the bill, must be set on an actuarially sound basis, and must be calculated to be self-supporting exclusive of any amounts held by the stabilization reserve fund (*see* "***Concurrent creation of Stabilization Reserve Fund***," below). A presumption exists that the MLUA's rates and premiums are not unreasonable or excessive. Unless otherwise provided for in the MLUA's plan of operation, all policies issued by or on behalf of the MLUA pursuant to the bill must be written so as to apply only to death, disease, or injury resulting from acts or omissions covered by the policy and reported during the policy period, for which a written claim is made against the insured. All policies issued by or on behalf of the MLUA must also contain a provision relating to the termination of the policy. The termination provision must grant an insured or the insured's estate, upon the termination of the policy through cancellation on grounds other than nonpayment of premiums, or following the retirement or death of the insured, the right to extend the policy's coverage on the payment of appropriate additional premiums

so as to include claims covered by the policy but discovered and reported after the term of the policy and for which written claim is made against the insured.

The MLUA is permitted to offer policyholders the option of accepting liability under a medical liability policy as a co-insurer, on sums paid out by the way of settlement or judgment against the policyholder on claims covered by the policy. The MLUA maintains sole authority for the settlement of any claim subject to the co-insurance option and may settle claims without the consent of the insured. The terms and conditions for the optional co-insurance medical liability policies must be set forth in the MLUA's plan of operation.

Cancellation of policies issued by the Association

(sec. 3929.67)

Medical liability policies issued to physicians by or on behalf of the MLUA may only be cancelled during the term of the policy for reasons listed by the bill. These are:

(1) Nonpayment of premiums;

(2) The suspension or revocation of the insured's license to practice medicine and surgery or osteopathic medicine and surgery;

(3) The failure of the insured to meet minimum underwriting standards;

(4) A change in the individual risk that substantially increases any hazard insured against after the coverage has been issued or renewed, except to the extent that the insurer should reasonably have foreseen the change or contemplated the risk.

Medical liability policies issued to hospitals by or on behalf of the MLUA may only be cancelled during the term of the policy for reasons listed by the bill. These are:

(1) Nonpayment of premiums;

(2) The hospital is not certified or accredited in accordance with the relevant provisions of Chapter 3727. of the Revised Code;

(3) An injunction has been granted against the operation of the hospital;

(4) The occurrence of a change in the individual risk that substantially increases any hazard insured against after the coverage has been issued or

renewed, except to the extent that the insurer should reasonably have foreseen the change or contemplated the risk.

Grievances; appeals

(sec. 3929.681)

Any insurer or other person aggrieved by any action or decision of the MLUA is permitted by the bill to appeal to the MLUA's Board of Governors. If desired, the Board of Governor's decision may then be appealed to the Superintendent of Insurance within 30 days from the date of the action or decision. The bill requires the Superintendent to issue an order, after a hearing held upon proper notice, approving or disapproving the action or decision at issue. The final orders and decisions of the Superintendent are subject to judicial review pursuant to the procedures of the Administrative Procedure Act.

Concurrent creation of Stabilization Reserve Fund

(sec. 3929.631)

The bill provides that in the event that the Superintendent of Insurance creates the Medical Liability Underwriting Association, or later reactivates the MLUA, the Superintendent also must create a Stabilization Reserve Fund, pursuant to the Administrative Procedure Act, to serve the MLUA. If created, the Stabilization Reserve Fund is to be administered by 13 directors, one director being the Superintendent or the Superintendent's deputy, and the other directors being appointees of the Superintendent. Five of the Superintendent's 12 appointees must be doctors of medicine and surgery, two must be doctors of osteopathic medicine and surgery, one must be a doctor of podiatric medicine, and four must represent hospitals. The directors serve without salary but are reimbursed for actual and necessary expenses incurred in the performance of their official duties. The directors have no personal liability with respect to their administration of the Fund.

The bill provides for the directors of the Stabilization Reserve Fund to act by majority vote, with seven directors constituting a quorum for the transaction of any business or the exercise of any power of the Stabilization Reserve Fund.

Each MLUA policyholder is required by the bill to pay an annual Stabilization Reserve Fund charge to the MLUA. The amount of the charge is determined by the directors with the agreement of the Board of Governors of the MLUA, subject to the Superintendent's approval. The MLUA must promptly pay all of the charges collected to the trustee of the Stabilization Reserve Fund. The trustee is a corporate trustee selected by the directors.

If the directors, the Board, and the Superintendent are unable to reach an agreement on the amount of the charge, the Superintendent is required to set the amount alone. Alternately, different charges may be set for different types of coverage, conditioned upon the amount being sufficient to ensure the MLUA is actuarially sound, adequately reserved, financially stable, and efficiently managed to satisfy the purposes of the bill. The bill provides that the MLUA must cancel the policy of any policyholder that fails to pay the Stabilization Reserve Fund charge.

Under the bill, the money in the Stabilization Reserve Fund is held in trust. The money may be invested by the trustee, subject to the approval of the directors. All income from the investments is credited to the Stabilization Reserve Fund.

The bill allows the money in the Stabilization Reserve Fund to be used for any of the following: (1) the Fund's administrative expenses, (2) to reimburse the MLUA for any deficit arising out of the MLUA's operations, and (3) any other purpose approved by the directors, if the purpose is reasonably consistent with the purposes of the MLUA. The directors make payment to the MLUA upon receiving certification from the MLUA of the amount due. At the end of the fiscal year, if the Board of Governors determines, and the Superintendent concurs, that the money in the Stabilization Reserve Fund, exclusive of dollars allocated for pending claims and after the payment of all claims and expenses, is in excess of the amount necessary to ensure that the MLUA is actuarially sound, adequately reserved, financially stable, and efficiently managed to satisfy the purposes of the bill, the Superintendent must return the excess fund moneys to applicants who have contributed to the Stabilization Reserve Fund but who are not MLUA policyholders at the end of the fiscal year. The Superintendent must determine the total amount contributed by each of these applicants during the entire period of the Stabilization Reserve Fund's existence. The Superintendent must return an amount to each applicant in the ratio of the total amount the applicant contributed to the fund as against the total amount contributed by all applicants. The amount returned must reflect any interest earned by the Stabilization Reserve Fund, less operating expenses. All policyholders continue to be subject to future Stabilization Reserve Fund charges.

Medical Liability Fund

(sec. 3929.682)

The bill creates a Medical Liability Fund in the state treasury. The Medical Liability Fund consists of the remaining funds of the Joint Underwriting Association dissolved under section 3929.721 of the Revised Code. The funds must be used for the funding of the MLUA or for another medical malpractice initiative approved by the General Assembly. The "remaining funds of the Joint

Underwriting Association" for this purpose is defined as the funds paid to the Treasurer of State in accordance with section 3929.721 of the Revised Code and any plan of dissolution or trust agreement adopted thereunder.

Dissolution; subsequent reactivation of the Association

(sec. 3929.632)

If the Superintendent of Insurance finds that circumstances that resulted in the creation of the MLUA (*see "**Superintendent of Insurance may create Medical Liability Underwriting Association**,"* above) no longer exist, the Superintendent is authorized by the bill to dissolve the MLUA or suspend its operations by rule adopted pursuant to the Administrative Procedure Act. Following the dissolution or suspension, the Superintendent must adopt rules under the Administrative Procedure Act that establish standards and procedures for the fair and equitable cessation or suspension of MLUA operations, including rules that ensure the payment of all claims on policies issued and expenses incurred by the MLUA. The rules may address issues related to the MLUA's reinsurance. The bill provides for the remaining funds of the MLUA to be used for the funding of a reactivated MLUA or for another medical malpractice initiative, subject to the approval of Ohio's General Assembly. The Superintendent is authorized by the bill to reactivate the MLUA following a suspension of the MLUA's operations, by rule adopted under the Administrative Procedure Act.

The following persons may not incur or suffer liability in connection with actions taken to comply with the bill in relation to the dissolution or reactivation of the MLUA:

(1) The MLUA;

(2) The MLUA's Board of Governors collectively and individual members of the Board of Governors;

(3) Agents and employees of the MLUA;

(4) The Superintendent of Insurance;

(5) Any other state officer responsible for the care and custody of the MLUA's funds.

Preferential transfers

(sec. 3903.28)

Antecedent debts and preferences

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

Currently, the Revised Code provides that a preference is the transfer of any 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, the effect of which is to enable the creditor to obtain a greater percentage of the creditor's debt than a similar creditor receives pursuant to the liquidation.

In part, the bill amends this provision by expanding the definition of a preference to include the transfer of an *interest* in an insurance company's property. The bill also increases the length of time prior to the filing of a complaint during which an insurance company's incurrence of a debt may qualify as an antecedent debt for the purpose of determining whether a transfer of the insurance company's property to a creditor on that debt is a preferential transfer. Currently, a transfer does not qualify as a preference unless made for or on account of an antecedent debt incurred within one year prior to the filing of a successful complaint for liquidation. However, if a liquidation order is entered while an insurance company is subject to a rehabilitation order, a transfer may qualify as 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 a successful complaint for liquidation, whichever is shorter. Under the bill, a debt made or suffered by an insurance company within *two* years before the *complaint date* may qualify as an antecedent debt for this purpose. The "complaint date" is defined in the bill as either of the following: (1) 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 (2) 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 uses the complaint date elsewhere in the bill as a new reference point (*see, e.g.*, 3903.28(B)(4) and (E)).

Currently, the Revised Code provides that an insurance company's transfer of property for or on account of an antecedent debt is not a preference unless the effect of the transfer "is to enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive." The bill changes the

wording of this condition, providing that an insurance company's transfer of property is not a preference unless the transfer "enables the creditor to receive more than the creditor would receive if the insurance company were liquidated under [Chapter 3903. of the Revised Code and] the transfer had not been made . . . ."

Court proceedings

(sec. 3903.28(G))

The Revised Code currently grants 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. Thus, another common pleas court may 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, on its own initiative, determine the value of the property or lien. Currently, the Revised Code permits the court to determine the value of the property or lien only upon a motion of a party in interest.

Avoidance of transfers

(sec. 3903.28(A)(2) and (A)(4), (J), and (L)(2))

Continuing law provides that preferences received by certain types of creditors may be avoided by a liquidator. 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 allows preferences to be avoided if the creditor is an officer or 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 an officer or director, excluding 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" is defined by the bill 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 new value 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.

Under the bill, 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 otherwise voidable under the bill.

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

Recovery of property or the value of property by a liquidator

(sec. 3903.28(A)(3))

The bill provides that a liquidator, when a preference is voidable, may recover the property or the value of the property from any person who receives the property, except that bona fide purchasers and lienors subsequent to the initial transfer retain a lien upon the property to the extent of consideration given. Currently, any bona fide purchaser or lienor who has given consideration of less than fair equivalent value has a lien upon the property to the extent of the consideration actually given. Current law provides only for the recovery of the property itself unless the property has been converted. When the property has

been converted, for example, by an unauthorized seizure of the property, the Revised Code provides for the liquidator's recovery of the value of property, rather than the property itself.

When a preference made by means of a lien or security title is voidable, the Revised Code currently permits a court, upon due notice, to order the lien or title to be preserved for the benefit of the estate. The bill provides 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 repealed for persons acting on behalf of an insurance company granting a preference

(sec. 3903.28(K), as prior to bill)

Currently, the Revised Code holds that an officer, manager, employee, shareholder, member, subscriber, attorney, and any other person acting on behalf of an insurance company is 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 the person has 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 prior to the date of the filing of a successful complaint for liquidation. This provision is repealed by the bill.

Set off repealed

(sec. 3903.28(I), as prior to bill)

A current provision of the Revised Code provides for a set off from a preference that may otherwise be recoverable from a creditor. 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. This provision is repealed by the bill.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	09-18-03	p.	1074
Reported by H. Insurance	12-18-03	pp.	1339-1341

h0282-rh-125.doc/kl