

§4375-A. Voidable property transfers and liens

1. Fraudulent transfers prior to petition. Fraudulent transfers prior to petition are governed by this subsection.

A. A transfer made or suffered and an obligation incurred by an insurer within one year prior to the filing of a successful petition for rehabilitation or liquidation under this chapter is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay or defraud either existing or future creditors. A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under this chapter that is fraudulent according to the terms of this section may be avoided by the receiver except as to a person who in good faith is a purchaser, lienor or obligee for a present fair equivalent value, but any purchaser, lienor or obligee who in good faith has given a consideration less than fair for such transfer, lien, or obligation may retain the property, lien or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate, and in that event, the receiver succeeds to and may enforce the rights of the purchaser, lienor or obligee. [PL 1991, c. 828, §31 (NEW).]

B. The determination of when a transfer is made is governed by the following rules.

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

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

(3) A transfer that creates an equitable lien may not be deemed to be perfected if there are available means by which a legal lien could be created.

(4) Any transfer not perfected prior to the filing of a petition for liquidation is deemed to be made immediately before the filing of the successful petition.

(5) A lien obtainable by legal or equitable proceedings upon a simple contract is one arising in the ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy, but does not include liens that under applicable law are given a special priority over other liens that are prior in time.

(6) A lien obtainable by legal or equitable proceedings may become superior to the rights of a transferee, or a purchaser may obtain rights superior to the rights of a transferee within the meaning of this paragraph if those consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials, but not if any acts subsequent to the obtaining of the lien or subsequent to the purchase require the agreement or concurrence of any 3rd party or require any further judicial action or ruling.

(7) The provisions of this paragraph apply whether or not there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers. [PL 1991, c. 828, §31 (NEW).]

C. Any transaction of the insurer with a reinsurer is deemed fraudulent and may be avoided by the receiver under paragraph A if:

(1) The transaction consists of the termination, adjustment or settlement of a reinsurance contract in which the reinsurer is released from any part of its duty to pay the originally

specified share of losses that had occurred prior to the time of the transaction unless the reinsurer gives a present fair equivalent value for the release; and

(2) Any part of the transaction takes place within one year prior to the date of filing of the petition through which the receivership is commenced. [PL 1991, c. 828, §31 (NEW).]

D. A person receiving any property from the insurer or a benefit from possession or use of the property that is fraudulently transferred is personally liable for the value of the preference and shall account to the liquidator. [PL 1991, c. 828, §31 (NEW).]

[PL 1991, c. 828, §31 (NEW).]

2. Fraudulent transfers after petition. Fraudulent transfers after petition are governed by this subsection.

A. After a petition for rehabilitation or liquidation has been filed, a transfer of any of the real property of the insurer made to a person acting in good faith is valid against the receiver if made for a present fair equivalent value or, if the transfer was not made for a present fair equivalent value, then it is valid only to the extent of the present consideration actually paid for the property, for which amount the transferee has a lien on the property so transferred. Constructive notice of the commencement of a proceeding in rehabilitation or liquidation is deemed to be given upon the recording of a copy of the petition for or order of rehabilitation or liquidation with the register of deeds in the county where any real property in question is located. The exercise by a court of the United States or any state or jurisdiction to authorize or effect a judicial sale of real property of the insurer within any county in any state is not impaired by the pendency of such a proceeding unless the copy is recorded in the county prior to the consummation of the judicial sale. [PL 1991, c. 828, §31 (NEW).]

B. After a petition for rehabilitation or liquidation has been filed and before either the receiver takes possession of the property of the insurer or an order of rehabilitation or liquidation is granted the following rules apply.

(1) A transfer of any of the property of the insurer, other than real property, made to a person acting in good faith is valid against the receiver if made for a present fair equivalent value or, if not made for a present fair equivalent value, then the transfer is valid only to the extent of the present consideration actually paid, for which amount the transferee has a lien on the property so transferred.

(2) A person acting in good faith who is indebted to the insurer or holding property of the insurer may pay the indebtedness or deliver the property or any part of the property to the insurer with the same effect as if the petition were not pending.

(3) A person having actual knowledge of the pending rehabilitation or liquidation who effectuates a transfer of any of the property of the insurer or who benefits by the transfer is deemed not to act in good faith.

(4) A person asserting the validity of a transfer under this section has the burden of proof. Except as elsewhere provided in this section, a transfer by or on behalf of the insurer after the date of the petition for liquidation by any person other than the liquidator is not valid against the liquidator. [PL 1991, c. 828, §31 (NEW).]

C. A person receiving any property from the insurer or a benefit from possession or use of the property that is fraudulently transferred under this subsection is personally liable for the value of the preference and shall account to the liquidator. [PL 1991, c. 828, §31 (NEW).]

[PL 1991, c. 828, §31 (NEW).]

3. Voidable preferences. Voidable preferences and liens are governed by this subsection.

A. A preference is a transfer that is made or suffered by the insurer of any of the property of an insurer to or for the benefit of a creditor for or on account of an antecedent debt if the effect of the transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would receive and the transfer is made within one year before the filing of a successful petition for liquidation under this chapter or, if a liquidation order is entered while the insurer is already subject to a rehabilitation order, if made or suffered within one year before the filing of the successful petition for rehabilitation or within 2 years before the filing of the successful petition for liquidation, whichever time is shorter. [PL 1991, c. 828, §31 (NEW).]

B. Any preference may be avoided by the liquidator if:

- (1) The insurer was insolvent at the time of the transfer;
- (2) The transfer was made within 4 months before the filing of the petition;
- (3) The creditor receiving it or to be benefitted by it or the creditor's agent had reasonable cause to believe that the insurer was insolvent or was about to become insolvent when the transfer was made; or
- (4) The creditor receiving it was an officer of the insurer or any employee or attorney or other person who was in fact in a position of comparable influence with the insurer whether or not that person held such a position, or any shareholder holding directly or indirectly more than 5% of any class of any equity security issued by the insurer, or any other person, firm, corporation, association or aggregation of persons with whom the insurer did not deal at arm's length. [PL 1991, c. 828, §31 (NEW).]

C. Where the preference is voidable, the liquidator may recover the property or its value if it has been converted from any person who received or converted the property, except that, where a bona fide purchaser or lienor has given less than fair equivalent value, that person is deemed to have a lien upon the property to the extent of the consideration actually given. When a preference by way of lien or security interest is voidable, the court may on due notice order the lien or title to be preserved for the benefit of the estate, in which event the lien or title passes to the liquidator. [PL 1991, c. 828, §31 (NEW).]

D. The determination of when a transfer is made is governed by subsection 1, paragraph B. [PL 1991, c. 828, §31 (NEW).]

E. A transfer of property for or on account of a new and contemporaneous consideration, which is considered under subsection 1, paragraph B to be made or suffered after the transfer because of delay in perfecting it, does not become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or bona fide purchasers' rights are performed within 21 days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan, has the same effect as a transfer for or on account of a new and contemporaneous consideration. [PL 1991, c. 828, §31 (NEW).]

F. If any lien considered voidable under paragraph B is dissolved by the furnishing of a bond or other obligation, the surety that was indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the filing of a petition under this chapter that results in a liquidation order, the indemnifying transfer or lien is also voidable. [PL 1991, c. 828, §31 (NEW).]

G. The property affected by any lien considered voidable under this subsection must be discharged from the lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety must pass to the liquidator; except that, the court may on due notice order a lien to be preserved for the benefit of the estate and the court may direct that a conveyance be executed as may be proper or adequate to evidence the title of the liquidator. [PL 1991, c. 828, §31 (NEW).]

H. The court has summary jurisdiction of any proceeding by the liquidator to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding must be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien. If the court finds that the value is less than the amount for which the property is held as indemnity or the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment to the liquidator of its value as ascertained by the court within a reasonable time as fixed by the court. [PL 1991, c. 828, §31 (NEW).]

I. The liability of the surety under a releasing bond or other like obligation must be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the liquidator or, when the property is retained under paragraph H, to the extent of the amount paid to the liquidator. [PL 1991, c. 828, §31 (NEW).]

J. If a creditor has been preferred and afterward in good faith gives the insurer further credit for property that becomes a part of the insurer's estate without security of any kind, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference that would otherwise be recoverable. [PL 1991, c. 828, §31 (NEW).]

K. If, within 4 months before the filing of a successful petition for liquidation under this chapter or at any time in contemplation of a proceeding to liquidate an insurer, the insurer pays money or transfers property, directly or indirectly, to an attorney-at-law for services rendered or to be rendered, the transactions may be examined by the court on its own motion and must be examined by the court on petition of the liquidator and may be held valid only to the extent they are reasonable in amount as determined by the court. Any excess may be recovered by the liquidator for the benefit of the estate; except that, where the attorney is in a position of influence in the insurer or an affiliate of the insurer, payment of any money or the transfer of any property to the attorney for services rendered or to be rendered is governed by the provisions of paragraph B, subparagraph (4). [PL 1991, c. 828, §31 (NEW).]

L. An officer, manager, employee, shareholder, member, subscriber, attorney or any other person acting on behalf of the insurer who knowingly participates in giving any preference when that person has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference is personally liable to the liquidator for the amount of the preference. If the transfer was made within 4 months before the date of filing of a successful petition for liquidation, a presumption arises that there was reasonable cause to believe the insurer was or was about to become insolvent. [PL 1991, c. 828, §31 (NEW).]

M. A person receiving any property from the insurer or a benefit from possession or use of the property as a preference voidable under this subsection is personally liable for the value of that preference and shall account to the liquidator. [PL 1991, c. 828, §31 (NEW).]

N. Nothing in this subsection prejudices any other claim by the liquidator against any person. [PL 1991, c. 828, §31 (NEW).]
[PL 1991, c. 828, §31 (NEW).]

4. Claims of holders of void or voidable rights. Claims of holders of void or voidable rights are governed by this subsection.

A. A claim of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment or encumbrance voidable under this section is not allowed unless the claimant surrenders the preference, lien, conveyance, transfer, assignment or encumbrance. If the avoidance is effected by a proceeding in which a final judgment is entered, the claim is not allowed unless the money is paid or the property is delivered to the liquidator within 30 days from the date of the

entering of the final judgment; except that the court having jurisdiction over the liquidation may allow further time if there is an appeal or other continuation of the proceeding. [PL 1991, c. 828, §31 (NEW).]

B. A claim allowable under paragraph A by reason of the avoidance, whether voluntary or involuntary, of a preference, lien, conveyance, transfer, assignment or encumbrance may be filed as an excused late filing if filed within 30 days from the date of the avoidance or within any further time allowed by the court under paragraph A. [PL 1991, c. 828, §31 (NEW).]
[PL 1991, c. 828, §31 (NEW).]

5. Negotiable instruments. Nothing in this section impairs the negotiability of currency or negotiable instruments.
[PL 1991, c. 828, §31 (NEW).]

SECTION HISTORY

PL 1991, c. 828, §31 (NEW).

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