



## Ohio Revised Code Section 3903.28 Preferences.

Effective: April 12, 2004

Legislation: House Bill 282 - 125th General Assembly

---

(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 two years before the complaint date that enables the creditor to receive more than the creditor would receive if the insurer was liquidated under this chapter, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the provisions of this chapter.

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

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

(b) The transfer was made within one hundred twenty days before the complaint date;

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

(d) The creditor receiving it was any of the following:

(i) An officer or director of the insurer;

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

(iii) A shareholder holding directly or indirectly more than five per cent of any class of any equity



security issued by the insurer;

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

(3) Where the preference is voidable, the liquidator may recover the property or the value of the property from the initial transferee, and if the property has been transferred or converted, the liquidator may recover the property or the value of the property from any person who has received the property, except that a subsequent bona fide purchaser or lienor has a lien upon the property to the extent of the consideration actually given. Where a preference by way of lien or security title is voidable, such lien or title is preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator.

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

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

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

(c) If the transfer was made to or for the benefit of a creditor, to the extent that after the transfer the creditor gave new value to or for the benefit of the insurer not secured by an otherwise unavoidable security interest, on account of which new value the insurer did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

(B)(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 can 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 can obtain rights superior to the rights of the transferee.

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

(4) A transfer not perfected prior to the complaint date is deemed to be made immediately before the complaint date.

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

(C)(1) 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. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(2) A lien obtainable by legal or equitable proceedings is superior to the rights of a transferee, or a purchaser may obtain rights superior to the rights of a transferee within the meaning of division (B) of this section, if such consequences 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. Such a lien is not, however, superior and such a purchase does not create superior rights for the purpose of division (B) of this section through any acts subsequent to the obtaining of such a lien or subsequent to such a purchase which require the agreement or concurrence of any third party or which require any further judicial action or ruling.

(D) A transfer of property for or on account of a new and contemporaneous consideration that is deemed under division (B) of this section to be made or suffered after the transfer because of delay in perfecting it does not thereby 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



vide purchasers' rights are performed within twenty-one 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.

(E) If any lien deemed voidable under division (A)(2) of this section has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the complaint date, the indemnifying transfer or lien is also deemed voidable.

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

(G) The Franklin county court of common pleas has jurisdiction of any proceeding initiated by the liquidator filed in the state to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding shall 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 may in the same proceeding ascertain the value of the property or lien, and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court, to the liquidator, within such reasonable times as the court shall fix.

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

(I) If an insurer shall, directly or indirectly, within one hundred twenty days before the complaint date, or at any time in contemplation of a proceeding to liquidate it, pay money or transfer property



to an attorney-at-law for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on motion of the liquidator and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the liquidator for the benefit of the estate provided that where the attorney is in a position of influence in the insurer or an affiliate thereof, payment of any money or the transfer of any property to the attorney-at-law for services rendered or to be rendered shall be governed by the provisions of division (A)(2) of this section.

(J) As to every transfer subject to avoidance under this section:

(1) Every person receiving any property from the insurer or the benefit thereof as a preference voidable under division (A) of this section shall be personally liable for the property and shall be bound to account to the liquidator.

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

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

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

(L) As used in this section:

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



(2) "New value" means 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.