60B.32 VOIDABLE PREFERENCES AND LIENS.

Subdivision 1. **Preferences.** (a) A preference is a transfer of any of 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 before the filing of a successful petition for liquidation under sections 60B.01 to 60B.61 the effect of which transfer may be to enable the creditor to obtain a greater percentage of 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, transfers otherwise qualifying shall be deemed preferences if made or suffered within one year before the filing of the successful petition for rehabilitation or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the liquidator, if (1) the insurer was insolvent at the time of the transfer, or (2) the transfer was made within four months before the filing of the petition, or (3) the creditor receiving it or to be benefited thereby or an agent of the creditor acting with reference thereto had reasonable cause to believe at the time when the transfer was made that the insurer was insolvent or was about to become insolvent, or (4) the creditor receiving it was an officer, employee, attorney, or other person who was in fact in a position of comparable influence in the insurer to an officer whether or not the creditor held such position, or any shareholder holding directly or indirectly more than five percent of any class of any equity security issued by the insurer, or any other person with whom the insurer did not deal at arm's length. Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property, except a bona fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value. Where the bona fide purchaser or lienor has given less than fair equivalent value, that person shall have 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, 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 shall pass to the liquidator.

Subd. 2. **Perfection of transfers.** (a) 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 could become superior to the rights of the transferee.

(b) 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 could obtain rights superior to the rights of the transferee.

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

(d) A transfer not perfected prior to the filing of a petition for liquidation shall be deemed to be made immediately before the filing of the successful petition.

(e) This subdivision applies whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.

Subd. 3. **Liens by legal or equitable proceedings.** (a) 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.

(b) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of subdivision 2,

if such 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. Such a lien could not, however, become superior and such a purchase could not create superior rights for the purpose of subdivision 2 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.

Subd. 4. **Twenty-one days rule.** A transfer of property for or on account of a new and contemporaneous consideration which is deemed under subdivision 2 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 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 shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.

Subd. 5. **Indemnifying transfers also voidable.** If any lien deemed voidable under subdivision 1, paragraph (b), 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 filing of a petition under sections 60B.01 to 60B.61 which results in a liquidation order, the indemnifying transfer or lien shall also be deemed voidable.

Subd. 6. **Avoidance of lien.** The property affected by any lien deemed voidable under subdivisions 1, paragraph (b), and 5 is discharged from the lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the liquidator, except that the court may on due notice order the lien to be preserved for the benefit of the estate and the court may direct that a conveyance be executed which is adequate to evidence the title of the liquidator.

Subd. 7. **Hearings to determine rights.** The court shall have 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 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, upon application of any party in interest, shall 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 fixes.

Subd. 8. **Surety's liability discharged.** 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 or, where the property is retained under subdivision 7 to the extent of the amount paid to the liquidator.

Subd. 9. **Setoff of new advances.** If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from the creditor.

Subd. 10. **Reexamination of attorney's fees.** If an insurer, directly or indirectly, within four months before the filing of a successful petition for liquidation under sections 60B.01 to 60B.61 or at any time in contemplation of a proceeding to liquidate it, pays money or transfers 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 petition 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.

Subd. 11. **Personal liability.** (a) Every 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 to be or about to become insolvent at the time of the preference shall be personally liable to the liquidator for the amount of the preference. It is permissible to infer that there is reasonable cause to so believe if the transfer was made within four months before the date of filing of the successful petition for liquidation.

(b) Every person receiving any property from the insurer or the benefit thereof as a preference voidable under subdivision 1, paragraph (b), shall be personally liable therefor and shall be bound to account to the liquidator.

(c) Nothing in this subdivision shall prejudice any other claim by the liquidator against any person.

History: *1969 c 708 s 32; 1986 c 444; 2020 c 83 art 1 s 6*