

LEGISLATIVE BILL 616

Approved by the Governor May 31, 1995

Introduced by Landis, 46

AN ACT relating to insurance; to amend sections 44-4820, 44-4828, and 44-4830, Reissue Revised Statutes of Nebraska; to change provisions relating to the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act; to provide operative dates; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 44-4820, Reissue Revised Statutes of Nebraska, is amended to read:

44-4820. (1) The director may petition for an order dissolving the corporate existence of a domestic insurer or the United States branch of an alien insurer domiciled in this state at the time he or she applies for a liquidation order. The court shall order dissolution of the corporation upon petition by the director upon or after the granting of a liquidation order. If the dissolution has not previously been ordered, ~~it~~ and if control and ownership of the insurer has not been transferred pursuant to subsection (2) of this section, dissolution shall be effected by operation of law upon the discharge of the liquidator if the insurer is insolvent but may be ordered by the court upon the discharge of the liquidator if the insurer is under a liquidation order for some other reason.

(2) Notwithstanding the entry of a liquidation order, on the motion of the liquidator and following such notice and hearing and on such terms as the court deems appropriate, the court may approve the liquidator's cancellation of all outstanding stock and other securities of, and other equity interests in, the insurer and the court may approve the issuance and sale of new stock or other securities for the purpose of transferring to one or more buyers control and ownership of the insurer together with any or all of its licenses and certificates to do business and such other assets as the liquidator deems appropriate to the transaction. The proceeds of such sale shall be assets of the liquidation estate of the insurer. The order of the court approving such a sale may provide that the sale is free and clear of all claims and interests of the insurer's insureds, creditors, shareholders, and members and all other persons interested in the insurer's estate and may discharge the insurer and all property which is the subject of the sale from all claims and interests of the insurer's insureds, creditors, shareholders, and members and all other persons interested in the insurer's estate, except that such a discharge shall not affect the rights of the insurer's insureds, creditors, shareholders, and members and all other persons interested in the insurer's estate to participate in distributions from the estate as otherwise provided in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act.

Sec. 2. Section 44-4828, Reissue Revised Statutes of Nebraska, is amended to read:

44-4828. (1)(a) A preference shall mean 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 the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act the effect of which transfer may be to enable the creditor to obtain a greater percentage of such 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, such transfers 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:

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

(ii) The transfer was made within four months before the filing of the petition;

(iii) The creditor receiving it or to be benefited thereby or his or her 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; or

(iv) The creditor receiving it was: An officer; any employee, attorney, or other person who was in fact in a position of comparable

influence in the insurer to an officer whether or not he or she held such position; 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, firm, corporation, association, or aggregation of persons with whom the insurer did not deal at arm's length. 7 or

(c) (v) When 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 when a bona fide purchaser or lienor has given less than fair equivalent value, he or she shall have a lien upon the property to the extent of the consideration actually given by him or her. When 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.

(2)(a) A transfer of property other than real property shall be 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 shall be 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 shall not be 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) The provisions of this subsection shall apply whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.

(3)(a) A lien obtainable by legal or equitable proceedings upon a simple contract shall be 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 shall 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 subsection (2) of this section 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 subsection (2) 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.

(4) A transfer of property for or on account of a new and contemporaneous consideration which is deemed under subsection (2) of this section to be made or suffered after the transfer because of delay in perfecting shall 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 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 shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.

(5) If any lien deemed voidable under subdivision (1)(b) 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 filing of a petition under the act which results in a liquidation order, the indemnifying transfer or lien shall also be deemed voidable.

(6) The property affected by any lien deemed voidable under subsections (1) and (5) of this section shall be discharged from such 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 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.

(7) The district court of Lancaster County 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. When 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 shall fix.

(8) The liability of the 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, when the property is retained under subsection (7) of this section, to the extent of the amount paid to the liquidator.

(9) 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 him or her.

(10) If an insurer, directly or indirectly, within four months before the filing of a successful petition for liquidation under the act or at any time in contemplation of a proceeding to liquidate, pays money or transfers property to an attorney for services rendered or to be rendered, the transactions 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, except that if 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 for services rendered or to be rendered shall be governed by subdivision (1)(b)(iv) of this section.

(11)(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 he or she has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference shall be personally liable to the liquidator for the amount of the preference. It shall be permissible to infer that there is a 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 subsection (1) of this section shall be personally liable therefor and shall be bound to account to the liquidator.

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

Sec. 3. Section 44-4830, Reissue Revised Statutes of Nebraska, is amended to read:

44-4830. (1) Mutual debts or mutual credits whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act shall be set off and the balance only shall be allowed or paid except as provided in subsections (2) through (4) and (3) of this section and in section 44-4833.

(2) No setoff shall be allowed in favor of any person when:

(a) The obligation of the insurer to the person would not at the date of the filing of a petition for rehabilitation or liquidation entitle the person to share as a claimant in the assets of the insurer;

(b) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff;

(c) The obligation of the insurer is owed to an affiliate of such person or any other entity or association other than the person;

(d) The obligation of the person is owed to an affiliate of the insurer or any other entity or association other than the insurer;

(e) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(f) The obligation between the person and the insurer arises from business which is both ceded to and assumed from the insurer, except that the rehabilitator may, with regard to such business, allow certain setoffs in rehabilitation if he or she finds the allowance of the setoffs appropriate.

(3) The liquidator shall provide persons that assumed business from the insurer with accounting statements identifying debts which are currently due and payable. Such persons may set off against such debts only mutual credits which are currently due and payable by the insurer to such persons for the period covered by the accounting statement.

(4) A person that ceded business to the insurer may set off debts due the insurer against only those mutual credits which the person has paid or which have been allowed in the insurer's delinquency proceeding.

(5) Notwithstanding the provisions of subsections (2) through (4) of this section, a setoff of sums due on obligations in the nature of those set forth in subdivision (2)(f) of this section shall be allowed for those sums accruing from business written if the contracts were entered into, renewed, or extended with the express written approval of the director, commissioner, or equivalent official of the state of domicile of the now-insolvent insurer, when in his or her judgment it was necessary to provide reinsurance in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer in connection with the exercise of his or her regulatory responsibilities.

(f) The obligations between the person and the insurer arise out of transactions by which either the person or the insurer has assumed risks and obligations from the other party and then has ceded back to that party substantially the same risks and obligations. Notwithstanding the provisions of this subdivision, the rehabilitator or liquidator may permit setoffs if in his or her discretion a setoff is appropriate because of specific circumstances relating to a transaction.

(3) The rehabilitator or liquidator shall provide persons with accounting statements identifying debts which are currently due and payable. When a person owes to the insurer amounts which are currently due and payable, against which the person asserts setoff of mutual credits which may become due and payable from the insurer in the future, the person shall promptly pay to the rehabilitator or liquidator the amounts currently due and payable, except that, notwithstanding section 44-4842, the rehabilitator or liquidator shall promptly and fully refund, to the extent of the person's prior payments, any mutual credits that become due and payable to the person by the insurer.

(4) ~~(6)~~ The provisions of subsections (2) through (5) subdivision (2)(f) and subsection (3) of this section shall apply to all contracts entered into, renewed, extended, or amended on or after July 1, 1992 the operative date of this section, and to debts or credits arising from any business written after such date pursuant to any such contract, including contracts in existence prior to such date, and shall supersede any agreements or contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer. For purposes of this subsection, any change in the terms of or consideration for any such contract shall be deemed an amendment of the contract.

Sec. 4. Sections 3 and 5 of this act become operative on October 1, 1995. The other sections of this act become operative on their effective date.

Sec. 5. Original section 44-4830, Reissue Revised Statutes of Nebraska, is repealed.

Sec. 6. Original sections 44-4820 and 44-4828, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 7. Since an emergency exists, this act takes effect when passed and approved according to law.