

HOUSE BILL No. 2514

AN ACT concerning insolvent insurance companies; pertaining to certain exemptions for the federal home loan bank; amending K.S.A. 40-3609, 40-3619, 40-3625, 40-3629, 40-3630 and 40-3631 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 40-3609 is hereby amended to read as follows: 40-3609. (a) *Except as provided in subsection (c)*, any receiver appointed in a proceeding under this act may at any time apply for, and the district court of Shawnee county may grant, such restraining orders, preliminary and permanent injunctions and other orders as may be deemed necessary and proper to prevent:

- (1) The transaction of further business;
- (2) the transfer of property;
- (3) interference with the receiver or with a proceeding under this act;
- (4) waste of the insurer's assets;
- (5) dissipation and transfer of bank accounts;
- (6) the institution or further prosecution of any actions or proceedings;
- (7) the obtaining of preferences, judgments, attachments, garnishments or liens against the insurer, its assets or its policyholders;
- (8) the levying of execution against the insurer, its assets or its policyholders;
- (9) the making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of the insurer;
- (10) the withholding from the receiver of books, accounts, documents or other records relating to the business of the insurer; or
- (11) any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of any proceeding under this act.

(b) *Except as provided in subsection (c)*, the receiver may apply to any court outside the state for the relief described in subsection (a).

(c) *No federal home loan bank shall be stayed, enjoined, or prohibited from exercising or enforcing any right or cause of action regarding collateral pledged under:*

- (1) *Any federal home loan bank security agreement; or*
- (2) *any pledge, security, collateral or guarantee agreement or other similar arrangement or credit enhancement relating to such security agreement.*

Sec. 2. K.S.A. 40-3619 is hereby amended to read as follows: 40-3619.

(a) *Except as provided in subsection (d)*, any court in this state before which any action or proceeding in which the insurer is a party, or is obligated to defend a party, is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for 90 days and such additional time as is necessary for the rehabilitator to obtain proper representation and prepare for further proceedings. The rehabilitator shall take such action respecting the pending litigation as necessary in the interests of justice and for the protection of creditors, policyholders and the public. The rehabilitator shall immediately consider all litigation pending outside this state and shall petition the courts having jurisdiction over such litigation for stays whenever necessary to protect the estate of the insurer.

(b) *Except as provided in subsection (d)*, no statute of limitation or defense of laches shall run with respect to any action by or against an insurer between the filing of a petition for appointment of a rehabilitator for that insurer and the order granting and denying that petition. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the order or rehabilitation is entered or the petition is denied. The rehabilitator, upon an order for rehabilitation, within one year or such other longer time as applicable law may permit, may institute an action or proceeding on behalf of the insurer upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered.

(c) Any guaranty association or foreign guaranty association covering life or health insurance or annuities shall have standing to appear in any court proceeding concerning the rehabilitation of a life or health insurer if such association is or may become liable to act as a result of the rehabilitation.

(d) *No federal home loan bank shall be stayed, enjoined, or prohibited from exercising or enforcing any right or cause of action regarding collateral pledged under:*

- (1) *Any federal home loan bank security agreement; or*
- (2) *any pledge, security, collateral or guarantee agreement or other similar arrangement or credit enhancement relating to such security agreement.*

Sec. 3. K.S.A. 40-3625 is hereby amended to read as follows: 40-3625.

(a) The liquidator shall have the power:

(1) To appoint a special deputy or deputies to act for the liquidator under this act, and to determine reasonable compensation for such deputies. The special deputy shall have all powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator;

(2) to employ employees and agents, legal counsel, actuaries, accountants, appraisers, consultants and other personnel necessary to assist in the liquidation;

(3) to appoint an advisory committee of policyholders, claimants or other creditors including guaranty associations should such a committee be deemed necessary. Such committee shall serve at the pleasure of the commissioner and shall serve without compensation other than reimbursement for personal travel and per diem living expenses. No other committee of any nature shall be appointed by the commissioner or the court in liquidation proceedings conducted under this act;

(4) to fix the reasonable compensation of employees and agents, legal counsel, actuaries, accountants, appraisers and consultants with the approval of the court;

(5) to pay reasonable compensation to persons appointed and to defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer;

(6) to hold hearings, to subpoena witnesses to compel their attendance, to administer oaths, to examine any person under oath, and to compel any person to subscribe to testimony of the person after the testimony has been correctly reduced to writing; and in connection therewith to require the production of any books, papers, records or other documents which are relevant to the inquiry. Such hearings shall be held in accordance with the Kansas administrative procedure act;

(7) to audit the books and records of all agents of the insurer insofar as those records relate to the business activities of the insurer;

(8) to collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:

(A) To institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts;

(B) to do such other acts as are necessary or expedient to collect, conserve or protect such insurer's assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon reasonable terms and conditions; and

(C) to pursue any creditor's remedies available to enforce claims;

(9) to conduct public and private sales of the property of the insurer;

(10) to use assets of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under K.S.A. 40-3641, *and amendments thereto*;

(11) to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with, any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable. The liquidator shall also have power to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation;

(12) to borrow money on the security of the insurer's assets or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation. Any such funds borrowed may be repaid as an administrative expense and have priority over any other claims in class 1 under the priority of distribution;

(13) to enter into such contracts as are necessary to carry out the

order to liquidate, and to affirm or disavow any contracts to which the insurer is a party, *except that no liquidator shall have the power to disavow, reject or repudiate:*

(A) *Any federal home loan bank security agreement; or*

(B) *any pledge, security, collateral or guarantee agreement or any other similar arrangement or credit enhancement relating to such security agreement;*

(14) to continue to prosecute and to institute in the name of the insurer or in the liquidator's name any and all suits and other legal proceedings, in this state or outside this state, and to abandon the prosecution of unprofitable claims. If the insurer is dissolved under K.S.A. 40-3624, *and amendments thereto*, the liquidator shall have the power to apply to any court in this state or elsewhere for leave to substitute such liquidator for the insurer as plaintiff;

(15) to prosecute any action which may exist on behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person;

(16) to remove any or all records and property of the insurer to the offices of the commissioner or to such other place as may be convenient for the purposes of efficient and orderly execution of the liquidation. Guaranty associations and foreign guaranty associations shall have such reasonable access to the records of the insurer as is necessary for them to carry out their statutory obligations;

(17) to deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions;

(18) to invest all sums not currently needed, unless the court orders otherwise;

(19) to file any necessary documents for record in the office of any register of deeds or record office in this state or elsewhere where property of the insurer is located;

(20) to assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds and the defense of usury. A waiver of any defense by the insurer after a petition in liquidation has been filed shall not bind the liquidator. Whenever a guaranty association or foreign guaranty association has an obligation to defend any suit, the liquidator shall give precedence to such obligation and may defend only in the absence of a defense by such guaranty associations;

(21) to exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member; including any power to avoid any transfer or lien that may be given by the general law and that is not included with K.S.A. 40-3629 through 40-3631, *and amendments thereto*;

(22) to intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and to act as the receiver or trustee whenever the appointment is offered;

(23) to enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states; and

(24) to exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with the provisions of this act.

(b) The enumeration, in this section, of the powers and authority of the liquidator shall not be construed as limitation upon the liquidator, nor shall it exclude in any manner the right to do such other acts not specifically enumerated or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

(c) Notwithstanding the powers of the liquidator as stated in subsections (a) and (b), the liquidator shall have no obligation to defend claims or to continue to defend claims subsequent to the entry of a liquidation order.

Sec. 4. K.S.A. 40-3629 is hereby amended to read as follows: 40-3629.

(a) *Except as provided in subsection (e)*, every transfer made or suffered and every obligation incurred by an insurer within one year prior to the filing of a successful petition for rehabilitation or liquidation under this act is fraudulent as to then existing and future creditors if made or in-

curred 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 act, which is fraudulent under 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, and except that 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, on due notice, may order any such transfer or obligation to be preserved for the benefit of the estate, and in that event, the receiver shall succeed to and may enforce the rights of the purchaser, lienor, or obligee.

(b) (1) 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.

(2) 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.

(3) 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.

(4) Any 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.

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

(c) Any transaction of the insurer with a reinsurer shall be deemed fraudulent and may be avoided by the receiver under subsection (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 transactions, unless the reinsurer gives a present fair equivalent value for the release; and

(2) any part of the transaction took place within one year prior to the date of filing of the petition through which the receivership was commenced.

(d) Every person receiving any property from the insurer or any benefit thereof which is a fraudulent transfer under subsection (a) shall be personally liable therefor and shall be bound to account to the liquidator.

(e) (1) *Except as provided in paragraph (2), no receiver shall be entitled to avoid any transfer of, or any obligation to transfer, money or any other property arising under or in connection with:*

(A) *Any federal home loan bank security agreement; or*

(B) *any pledge, security, collateral or guarantee agreement or any other similar arrangement or credit enhancement relating to such federal home loan bank security agreement.*

(2) *A transfer may be avoided under this section if such transfer was made with actual intent to hinder, delay or defraud either existing or future creditors.*

Sec. 5. K.S.A. 40-3630 is hereby amended to read as follows: 40-3630.

(a) *Except as provided in subsection (e), 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 shall be valid against the receiver if made for a present fair equivalent value, or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien on the property so transferred. The commencement of a proceeding in rehabilitation or liquidation shall be constructive notice 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 shall not be impaired by the*

pendency of such a proceeding unless the copy is recorded in the county prior to the consummation of the judicial sale.

(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:

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

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

(3) A person having actual knowledge of the pending rehabilitation or liquidation shall be deemed not to act in good faith.

(4) A person asserting the validity of a transfer under this section shall have the burden of proof. Except as elsewhere provided in this section, no transfer by or on behalf of the insurer after the date of the petition for liquidation by any person other than the liquidator shall be valid against the liquidator.

(c) Every person receiving any property from the insurer or any benefit thereof which is a fraudulent transfer under subsection (a) shall be personally liable therefor and shall be bound to account to the liquidator.

(d) Nothing in this act shall impair the negotiability of currency or negotiable instruments.

(e) (1) *Except as provided in paragraph (2), no receiver shall be entitled to avoid any transfer of, or any obligation to transfer, money or any other property arising under or in connection with:*

(A) *Any federal home loan bank security agreement; or*

(B) *any pledge, security, collateral or guarantee agreement or any other similar arrangement or credit enhancement relating to such federal home loan bank security agreement.*

(2) *A transfer may be avoided under this section if such transfer was made with actual intent to hinder, delay or defraud either existing or future creditors.*

Sec. 6. K.S.A. 40-3631 is hereby amended to read as follows: 40-3631.

(a) (1) 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 this act, the effect of which transfer may be to enable the creditor to obtain a greater percentage of this 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, then 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.

(2) *Except as provided in paragraph (4), any preference may be avoided by the liquidator if:*

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

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

(C) the creditor receiving the preference 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; or

(D) the creditor receiving the preference was an officer, or any employee or attorney or other person who was in fact in a position of comparable influence with the insurer to an officer whether or not such creditor held such 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.

(3) 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 where a bona fide purchaser or lienor has given less than fair equivalent value, such 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.

(4) *No liquidator or receiver shall be entitled to avoid any preference arising under or in connection with:*

(A) *Any federal home loan bank security agreement; or*

(B) *any pledge, security, collateral or guarantee agreement or any other similar arrangement or credit enhancement relating to such security agreement.*

(b) (1) A transfer of property other than real property shall be deemed to be made or suffered when such transfer 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.

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

(3) 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.

(4) 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.

(5) The provisions of this subsection 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 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 (b), 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 (b) through any actions subsequent to the obtaining of such a lien or subsequent to such a purchase which requires 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 which is deemed under subsection (b) to be made or suffered after the transfer because of delay in perfecting such transfer 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 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.

(e) If any lien deemed voidable under subsection (a)(2) 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 this act which results in a liquidation order, the indemnifying transfer or lien shall also be deemed voidable.

(f) The property affected by any lien deemed voidable under subsections (a) and (e) 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.

(g) The district court of Shawnee 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. 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 shall fix.

(h) 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 where the property is retained under subsection (g) to the extent of the amount paid to the liquidator.

(i) 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 setoff against the preference which would otherwise be recoverable.

(j) If an insurer shall, directly or indirectly, within four months before the filing of a successful petition for liquidation under this act, or at any time in contemplation of a proceeding to liquidate such insurer, pay money or transfer property to an attorney-at-law 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 benefits of the estate provided that where the attorney is in a position of influence with 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 provision of subsection (a)(2)(D).

(k) (1) 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 such person 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 is 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 this successful petition for liquidation.

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

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

Sec. 7. K.S.A. 40-3609, 40-3619, 40-3625, 40-3629, 40-3630 and 40-3631 are hereby repealed.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and passed that body

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.