

1 AN ACT relating to delinquency proceedings involving insurer-members of federal  
2 home loan banks.

3 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

4 ➔Section 1. KRS 304.33-030 is amended to read as follows:

5 For the purposes of this subtitle:

6 (1) "Agent" means all persons who have collected or are holding premiums or other  
7 assets of the insurer, including but not limited to brokers, intermediaries, managing  
8 general agents, underwriting managers, and reinsurance managers, and any other  
9 persons who have entered into a fiduciary relationship with the insurer subject to  
10 delinquency proceedings, including but not limited to persons holding licenses  
11 under Subtitles 9, 32, 38, and 43 of KRS Chapter 304;

12 ~~(2) "Commissioner" means the commissioner of the Department of Insurance of this~~  
13 ~~state;~~

14 ~~(3) "Receiver" means receiver, liquidator, rehabilitator, or conservator, as the context~~  
15 ~~requires;~~

16 ~~(3)~~~~(4)~~ "Insurer" has the meaning defined in Subtitle 1 of this chapter. For purposes of  
17 this subtitle, all other persons included under KRS 304.33-020 shall be deemed to  
18 be insurers;

19 ~~(4)~~~~(5)~~ "Delinquency proceeding" means any proceeding commenced against an  
20 insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving  
21 such insurer, and any summary proceeding under KRS 304.33-110 to 304.33-130,  
22 inclusive;

23 ~~(6) "State" has the meaning defined in Subtitle 1 of this chapter;~~

24 ~~(5)~~~~(7)~~ "Foreign country" means territory not in any state;

25 ~~(6)~~~~(8)~~ "Domiciliary state" means the state in which an insurer is incorporated or  
26 organized or, in the case of an alien insurer, the state in which the insurer has, at the  
27 commencement of delinquency proceedings, the largest amount of its assets held in

1 trust and on deposit for the benefit of policyholders and creditors in the United  
2 States;

3 ~~(7)~~~~(9)~~ "Ancillary state" means any state other than a domiciliary state;

4 ~~(8)~~~~(10)~~ "Reciprocal state" means any state other than this state in which in substance  
5 and effect subsection (1) of KRS 304.33-200, subsections (1) and (3) of KRS  
6 304.33-530, KRS 304.33-540, and KRS 304.33-560 to 304.33-590, inclusive, are in  
7 force, and in which provisions are in force requiring that the commissioner be the  
8 receiver of a delinquent insurer, and in which some provision exists for the  
9 avoidance of fraudulent conveyances and preferential transfers;

10 ~~(9)~~~~(11)~~ "General assets" means all property, real, personal or otherwise, not  
11 specifically mortgaged, pledged, deposited or otherwise encumbered for the security  
12 or benefit of specified persons or limited classes of persons, and as to specifically  
13 encumbered property the term includes all such property or its proceeds in excess of  
14 the amount necessary to discharge the sums secured thereby, except as otherwise  
15 expressly provided in this subtitle. Assets held in trust and on deposit for the  
16 security or benefit of all policyholders or all policyholders and creditors, in more  
17 than a single state, shall be treated as general assets;

18 ~~(10)~~~~(12)~~ "Reinsurance intermediary" means any person who acts as a broker in  
19 soliciting, negotiating, or procuring the making of any reinsurance contract or  
20 binder, or acts as an agent in accepting any reinsurance contract or binder on behalf  
21 of an insurer;

22 ~~(11)~~~~(13)~~ "Court" means the Franklin Circuit Court;

23 ~~(12)~~~~(14)~~ "Preferred claim" means any claim with respect to which the law accords  
24 priority of payment from the general assets of the insurer;

25 ~~(13)~~~~(15)~~ "Special deposit claim" means any claim secured by a deposit made pursuant  
26 to law for the security or benefit of one (1) or more limited classes of persons, but  
27 not including any claim secured by general assets;

1 ~~(14)~~~~(16)~~ "Secured claim":

2 (a) Means any claim secured by mortgage, trust deed, pledge, deposit as security,  
3 escrow or otherwise, but not including special deposit claims or claims against  
4 general assets including, but not limited to, claims of setoff, counterclaim, or  
5 recoupment against obligations to pay premiums to the insurer; ~~and~~~~(-)~~

6 (b) ***Shall include***~~The term also includes~~ claims which have become liens upon  
7 specific assets by reason of judicial process, except where they have been  
8 invalidated;

9 ~~(15)~~~~(17)~~ "Premium" has the meaning set forth in Subtitle 14 of this chapter;

10 ~~(16)~~~~(18)~~ "Insolvency" means that the insurer is unable to pay its debts or meet its  
11 obligations as they mature or that its assets do not exceed its liabilities plus the  
12 greater of:

13 (a) Any capital and surplus required by law to be constantly maintained; or

14 (b) Its authorized and issued capital stock. For purposes of this subsection,  
15 "assets" includes one-half (1/2) of the maximum total assessment liability of  
16 the policyholders of the insurer, and "liabilities" includes reserves required by  
17 law. For policies issued on the basis of unlimited assessment liability, the  
18 maximum total liability, for purposes of determining solvency only, shall be  
19 deemed to be that amount that could be obtained if there were one hundred  
20 percent (100%) collection of an assessment at the rate of ten (10) mills;

21 ~~(17)~~~~(19)~~ "Fair consideration" is given for property or an obligation:

22 (a) When in exchange for such property or obligation, as a fair equivalent  
23 therefor, and in good faith, property is conveyed or services are rendered or  
24 obligation is incurred or an antecedent debt is satisfied; or

25 (b) When such property or obligation is received in good faith to secure a present  
26 advance or antecedent debt in amount not disproportionately small as  
27 compared to the value of the property or obligation obtained;

1 ~~(18)~~~~(20)~~ "Creditor" is a person having any claim, whether matured or unmatured,  
2 liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent;

3 ~~(19)~~~~(21)~~ "Transfer" includes the sale and every other method, direct or indirect, of  
4 disposing of or of parting with property or with an interest therein or with the  
5 possession thereof or of fixing a lien upon property or upon an interest therein,  
6 absolutely or conditionally, voluntarily or involuntarily, by or without judicial  
7 proceedings. The retention of a security title to property delivered to a debtor shall  
8 be deemed a transfer suffered by the debtor;

9 ~~[(22) "Doing business" has the meaning designated in Subtitle 1 of this chapter; and]~~

10 ~~(20)~~~~(23)~~ "Guaranty association" means the Kentucky Insurance Guaranty Association,  
11 the Kentucky Life and Health Insurance Guaranty Association and any other similar  
12 entity now or hereafter created by the Legislature of this state for the payment of  
13 claims of insolvent insurers. "Foreign guaranty association" means any similar  
14 entities now in existence in, or hereafter created by the legislature of, any other  
15 state;

16 **(21) "Federal home loan bank" means an institution chartered under the Federal**  
17 **Home Loan Bank Act of 1932, 12 U.S.C. sec. 1421 et seq.; and**

18 **(22) "Insurer-member" means an insurer that is a member of a federal home loan**  
19 **bank.**

20 ➔SECTION 2. A NEW SECTION OF SUBTITLE 33 OF KRS CHAPTER 304  
21 IS CREATED TO READ AS FOLLOWS:

22 **(1) (a) A federal home loan bank shall not be stayed or otherwise prohibited by a**  
23 **court from exercising its rights regarding collateral pledged by an insurer-**  
24 **member for more than ten (10) days following the date a temporary**  
25 **restraining order, preliminary injunction, or permanent injunction is issued**  
26 **by the court pursuant to Section 3 of this Act.**

27 **(b) A federal home loan bank exercising its rights regarding collateral pledged**

1 by an insurer-member shall, within seven (7) days of receiving a redemption  
2 request made by the insurer-member, repurchase any of the insurer-  
3 member's outstanding capital stock in excess of the amount the insurer-  
4 member must hold as a minimum investment. The federal home loan bank  
5 shall repurchase the excess outstanding capital stock only to the extent it  
6 determines in good faith that the repurchase is:

- 7 1. Permissible under federal laws and regulations and the federal home  
8 loan bank's capital plan; and
- 9 2. Consistent with the capital stock practices currently applicable to the  
10 federal home loan bank's entire membership.

11 (2) (a) Not later than ten (10) days after the date of appointment of a receiver in a  
12 proceeding under this subtitle involving an insurer-member, the federal  
13 home loan bank shall provide to the receiver a process and timeline for all  
14 of the following:

- 15 1. The release of any collateral held by the federal home loan bank that  
16 exceeds the amount that is required to support the secured obligation  
17 of the insurer-member and that is remaining after any repayment of  
18 loans, as determined under the applicable agreements between the  
19 federal home loan bank and insurer-member;
- 20 2. The release of any collateral of the insurer-member remaining in the  
21 federal home loan bank's possession following the repayment in full  
22 of all outstanding secured obligations of the insurer-member;
- 23 3. The payment of fees owed by the insurer-member and the operation,  
24 maintenance, closure, or disposition of deposits and other accounts of  
25 the insurer-member, as mutually agreed upon by the receiver and the  
26 federal home loan bank; and
- 27 4. Any redemption or repurchase of federal home loan bank stock or

1                   excess stock of any class that the insurer-member is required to own  
 2                   under agreements between the federal home loan bank and the  
 3                   insurer-member.

4           **(b) Upon request of the receiver appointed in a proceeding under this subtitle**  
 5                   **involving an insurer-member, the federal home loan bank shall provide to**  
 6                   **the receiver any available options for the insurer-member to renew or**  
 7                   **restructure a loan. In determining which options are available, the federal**  
 8                   **home loan bank may consider:**

9                   **1. Market conditions;**

10                  **2. The terms of any loans outstanding to the insurer-member;**

11                  **3. The applicable policies of the federal home loan bank; and**

12                  **4. The federal laws and regulations applicable to federal home loan**  
 13                   **banks.**

14           ➔Section 3. KRS 304.33-050 is amended to read as follows:

15   (1) **Except as provided in Section 2 of this Act,** any receiver appointed in a proceeding  
 16           under this subtitle may at any time apply for and any court of general jurisdiction  
 17           may grant such restraining orders, temporary and permanent injunctions, and other  
 18           orders as are deemed necessary and proper to prevent:

19           (a) The transaction of further business by or on behalf of the insurer;

20           (b) The transfer of property against which the receiver has a claim;

21           (c) Interference with the receiver or with the proceedings;

22           (d) Waste of the insurer's assets;

23           (e) Dissipation and transfer of bank accounts;

24           (f) The institution or further prosecution of any actions or proceedings by or on  
 25           behalf of the insurer;

26           (g) The institution or further prosecution of any action against the receiver or the  
 27           insurer including, but not limited to, interpleader or other actions involving

- 1 assets against which the receiver has a claim;
- 2 (h) The obtaining of preferences, judgments, attachments, garnishments or liens  
3 against the insurer or its assets;
- 4 (i) The levying of execution against the insurer or its assets;
- 5 (j) The making of any sale or deed for nonpayment of taxes or assessments that  
6 would lessen the value of the assets of the insurer;
- 7 (k) The withholding from the receiver of books, accounts, documents, or other  
8 records relating to the business of the insurer;
- 9 (l) Any other threatened or contemplated action that might lessen the value of the  
10 insurer's assets or prejudice the rights of policyholders, creditors, or  
11 shareholders, or the administration of the proceeding; or
- 12 (m) Any suit or other action against a reinsurer of the insurer.
- 13 (2) The receiver may apply to any court outside of this state for the relief described in  
14 subsection (1) of this section.
- 15 ➔Section 4. KRS 304.33-170 is amended to read as follows:
- 16 (1) Stays in pending litigation. **Except as provided in Section 2 of this Act,** ~~on request~~  
17 ~~of the rehabilitator,~~ any court in this state before which any action or proceeding by  
18 or against an insurer is pending when a rehabilitation order against the insurer is  
19 entered shall, **upon request of the rehabilitator,** stay the action or proceeding for  
20 such time as is necessary for the rehabilitator to obtain proper representation and  
21 prepare for further proceedings. The court that entered the rehabilitation order shall  
22 order the rehabilitator to take such action respecting the pending litigation as the  
23 court deems necessary in the interests of justice and for the protection of creditors  
24 and policyholders. The rehabilitator shall immediately consider all litigation  
25 pending outside this state and shall petition the courts having jurisdiction over that  
26 litigation for stays whenever necessary to protect the estate of the insurer.
- 27 (2) Statutes of limitations on claims by insurer. The time between the filing of a

1 petition for rehabilitation against an insurer and denial of the petition or an order of  
2 rehabilitation shall not be considered to be a part of the time within which any  
3 action may be commenced by the insurer. Any action by the insurer that might have  
4 been commenced when the petition was filed may be commenced for at least sixty  
5 (60) days after the order of rehabilitation is entered.

6 (3) Statutes of limitations on claims against insurer. The time between the filing of a  
7 petition for rehabilitation against an insurer and the denial of the petition or an order  
8 of rehabilitation shall not be considered to be a part of the time within which any  
9 action may be commenced against the insurer. Any action against the insurer that  
10 might have been commenced when the petition was filed may be commenced for at  
11 least sixty (60) days after the order of rehabilitation is entered or the petition is  
12 denied.

13 (4) A guaranty association or a foreign guaranty association shall have standing to  
14 appear in any court proceeding concerning the rehabilitation of an insurer if such  
15 association is or may become liable to act as a result of the rehabilitation.

16 ➔Section 5. KRS 304.33-240 is amended to read as follows:

17 The liquidator shall report to the court monthly, or at other intervals specified by the  
18 court, on the progress of the liquidation in whatever detail the court orders. The liquidator  
19 may:

20 (1) Appoint a special deputy to act for him or her under this subtitle, and, subject to the  
21 court's approval, determine his or her compensation. The special deputy shall have  
22 all powers of the liquidator granted by this section. The special deputy shall serve at  
23 the pleasure of the liquidator;

24 (2) Appoint or engage employees and agents, legal counsel, actuaries, accountants,  
25 appraisers, consultants, and other personnel he or she deems necessary to assist in  
26 the liquidation;

27 (3) Fix the compensation of persons under subsection (2) of this section, subject to the



- 1 control of the court;
- 2 (4) Defray all expenses of taking possession of, conserving, conducting, liquidating,  
3 disposing of, or otherwise dealing with the business and property of the insurer. If  
4 the property of the insurer does not contain sufficient cash or liquid assets to defray  
5 the costs incurred, the liquidator may advance the costs so incurred out of any  
6 available appropriation. Any amounts so paid shall be deemed expense of  
7 administration and shall be repaid for the credit of the Department of Insurance out  
8 of the first available moneys of the insurer;
- 9 (5) Hold hearings, subpoena witnesses and compel their attendance, administer oaths,  
10 examine any person under oath, and compel any person to subscribe to his or her  
11 testimony after it has been correctly reduced to writing, and in connection therewith  
12 require the production of any books, papers, record, or other documents which he or  
13 she deems relevant to the inquiry;
- 14 (6) Collect all debts and moneys due and claims belonging to the insurer, wherever  
15 located, and for this purpose institute timely action in other jurisdictions to marshal  
16 the assets of the insurer; forestall garnishment and attachment proceedings against  
17 such debts; do such other acts as are necessary or expedient to collect, conserve or  
18 protect its assets or property, including sell, compound, compromise, or assign for  
19 purposes of collection, subject to court approval and upon such terms and  
20 conditions as the liquidator deems best, any disputed claims; and pursue any  
21 creditor's remedies available to enforce his or her claims. In lieu of collecting funds  
22 representing unearned premium of a policyholder which are in the possession of the  
23 insurer's agent with respect to the kinds of direct insurance protected under KRS  
24 304.36-030, the liquidator may authorize the use of such funds to replace the  
25 insurance coverage terminated pursuant to KRS 304.33-210, upon receipt from the  
26 agent of appropriate notice of such replacement of the insurance coverage with an  
27 insurer within sixty (60) days after the date of the liquidation order;

- 1 (7) Audit the books and records of all agents of the insurer insofar as these records  
2 relate to the business activities of the insurer;
- 3 (8) Conduct public and private sales of the property of the insurer in a manner  
4 prescribed by the court;
- 5 (9) Use assets of the estate to transfer policy obligations to a solvent assuming insurer,  
6 if the transfer can be arranged without prejudice to applicable priorities under KRS  
7 304.33-430;
- 8 (10) Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or  
9 otherwise dispose of or deal with any property of the insurer at its market value or  
10 upon such terms and conditions as are fair and reasonable, except that no  
11 transaction involving property the market value of which exceeds ten thousand  
12 dollars (\$10,000) shall be concluded without express permission of the court. The  
13 liquidator also may execute, acknowledge, and deliver any deeds, assignments,  
14 releases, and other instruments necessary or proper to effectuate any sale of property  
15 or other transaction in connection with the liquidation. In cases where real property  
16 sold by the liquidator is located other than in the county where the liquidation is  
17 pending, the liquidator shall cause to be filed with the county clerk for the county in  
18 which the property is located a certified copy of the order appointing him or her;
- 19 (11) Borrow money, subject to court approval, on the security of the insurer's assets or  
20 without security and execute and deliver all documents necessary to that transaction  
21 for the purpose of facilitating the liquidation;
- 22 (12) Enter into such contracts as are necessary to carry out the order to liquidate, and  
23 affirm or disavow any contracts to which the insurer is a party, except the liquidator  
24 shall not disavow, reject, or repudiate a federal home loan bank security  
25 agreement or any pledge agreement, security agreement, collateral agreement,  
26 guarantee agreement, or other similar arrangement or credit enhancement  
27 relating to a security agreement to which a federal home loan bank is a party;

- 1 (13) Continue to prosecute and institute in the name of the insurer or in his or her own  
2 name any suits and other legal proceedings, in this state or elsewhere, and abandon  
3 the prosecution of claims he or she deems unprofitable to pursue further. If the  
4 insurer is dissolved under KRS 304.33-220, he or she may apply to any court in this  
5 state or elsewhere for leave to substitute himself or herself for the insurer as  
6 plaintiff;
- 7 (14) Prosecute any action which may exist in behalf of the creditors, members,  
8 policyholders, or shareholders of the insurer against any officer of the insurer, or  
9 any other person;
- 10 (15) Remove any records and property of the insurer to the offices of the commissioner  
11 or to such other place as is convenient for the purposes of efficient and orderly  
12 execution of the liquidation;
- 13 (16) Deposit in one (1) or more banks in this state such sums as are required for meeting  
14 current administration expenses and dividend distributions;
- 15 (17) File any necessary documents for record in the office of any county clerk or record  
16 office in this state or elsewhere where property of the insurer is located;
- 17 (18) Assert all defenses available to the insurer as against third persons, including  
18 statutes of limitations, statutes of frauds, and the defense of usury. A waiver of any  
19 defense by the insurer after a petition for liquidation has been filed shall not bind  
20 the liquidator;
- 21 (19) Exercise and enforce all the rights, remedies and powers of any creditor,  
22 shareholder, policyholder, or member, including any power to avoid any transfer or  
23 lien that may be given by law and that is not included within KRS 304.33-290 to  
24 304.33-310, inclusive;
- 25 (20) Intervene in any proceeding wherever instituted that might lead to the appointment  
26 of a receiver or trustee, and act as the receiver or trustee whenever the appointment  
27 is offered;

1 (21) Enter into agreements with any receiver or commissioner of any other state relating  
2 to the rehabilitation, liquidation, conservation, or dissolution of an insurer doing  
3 business in both states;

4 (22) Exercise all powers now held or hereafter conferred upon receivers by the laws of  
5 this state not inconsistent with this subtitle; and

6 (23) The enumeration in this section of the powers and authority of the liquidator is not a  
7 limitation upon him or her, nor does it exclude his or her right to do such other acts  
8 not herein specifically enumerated or otherwise provided for as are necessary or  
9 expedient for the accomplishment of or in aid of the purpose of liquidation.

10 ➔Section 6. KRS 304.33-290 is amended to read as follows:

11 (1) Definition and effect. **Except as provided in subsection (5) of this section,** every  
12 transfer made or suffered and every obligation incurred by an insurer within one (1)  
13 year prior to the filing of a successful petition for rehabilitation or liquidation under  
14 this subtitle shall be fraudulent as to then existing and future creditors if made or  
15 incurred without fair consideration, or with actual intent to hinder, delay or defraud  
16 either existing or future creditors. A transfer made or an obligation incurred by an  
17 insurer ordered to be rehabilitated or liquidated under this subtitle, which is  
18 fraudulent under this section, may be avoided by the receiver, except as to a person  
19 who in good faith is a purchaser, lienor, or obligee for a present fair equivalent  
20 value; and except that any purchaser, lienor, or obligee, who in good faith has given  
21 a consideration less than fair for such transfer, lien, or obligation, may retain the  
22 property, lien, or obligation as security for repayment. The court may, on due notice,  
23 order any such transfer or obligation to be preserved for the benefit of the estate,  
24 and in that event the receiver shall succeed to and may enforce the rights of the  
25 purchaser, lienor, or obligee.

26 (2) Perfection of transfers.

27 (a) Personal property. A transfer of property other than real property shall be

1           deemed to be made or suffered when it becomes so far perfected that no  
2           subsequent lien obtainable by legal or equitable proceedings on a simple  
3           contract could become superior to the rights of the transferee under subsection  
4           (3) of KRS 304.33-310.

5           (b) Real property. A transfer of real property shall be deemed to be made or  
6           suffered when it becomes so far perfected that no subsequent bona fide  
7           purchaser from the insurer could obtain rights superior to the rights of the  
8           transferee.

9           (c) Equitable liens. A transfer which creates an equitable lien shall not be deemed  
10          to be perfected if there are available means by which a legal lien could be  
11          created.

12          (d) Transfer not perfected prior to petition. Any transfer not perfected prior to the  
13          filing of a petition for liquidation shall be deemed to be made immediately  
14          before the filing of the successful petition.

15          (e) Actual creditors unnecessary. This subsection shall apply whether or not there  
16          are or were creditors who might have obtained any liens or persons who might  
17          have become bona fide purchasers.

18         (3) Fraudulent reinsurance transactions. Any transaction of the insurer with a reinsurer  
19          shall be deemed fraudulent and may be avoided by the receiver under subsection (1)  
20          of this section if:

21                 (a) The transaction consists of the termination, adjustment or settlement of a  
22                 reinsurance contract in which the reinsurer is released from any part of its duty  
23                 to pay the originally specified share of losses that had occurred prior to the  
24                 time of the transaction, unless the reinsurer gives a present fair equivalent  
25                 value for the release; and

26                 (b) Any part of the transaction took place within one (1) year prior to the date of  
27                 filing of the petition through which the receivership was commenced.

1 (4) Every person receiving any property from the insurer or any benefit thereof which is  
2 a fraudulent transfer under this section shall be personally liable therefor and shall  
3 be bound to account to the liquidator.

4 **(5) (a) Except as provided in paragraph (b) of this subsection, any transfer of, and**  
5 **any obligation to transfer, money or other property from an insurer-**  
6 **member to the federal home loan bank under a federal home loan bank**  
7 **security, pledge, collateral, or guarantee agreement, or other similar**  
8 **arrangement or credit enhancement, shall not be deemed fraudulent and**  
9 **shall not be avoided by the receiver under subsection (1) of this section if**  
10 **the agreement, arrangement, or enhancement is:**

- 11 **1. Made in the ordinary course of business; and**
- 12 **2. Made in compliance with the applicable federal home loan bank**  
13 **agreement.**

14 **(b) A transfer may be deemed fraudulent and may be avoided by the receiver**  
15 **under subsection (1) of this section if the transfer is made with the intent to**  
16 **hinder, delay, or defraud:**

- 17 **1. An insurer-member;**
- 18 **2. The receiver of the insurer-member; or**
- 19 **3. Existing or future creditors of the insurer-member.**

20 ➔Section 7. KRS 304.33-310 is amended to read as follows:

- 21 (1) Preferences.
- 22 (a) Preference defined. A preference is a transfer of any of the property of an
- 23 insurer to or for the benefit of a creditor, for or on account of an antecedent
- 24 debt made or suffered by the insurer within one (1) year before the filing of a
- 25 successful petition for liquidation under this subtitle, the effect of which
- 26 transfer may be to enable the creditor to obtain a greater percentage of his debt
- 27 than another creditor of the same class would receive. If a liquidation order is

1 entered while the insurer is already subject to a rehabilitation order, transfers  
 2 otherwise qualifying shall be deemed preferences if made or suffered within  
 3 one (1) year before the filing of the successful petition for rehabilitation or  
 4 within two (2) years before the filing of the successful petition for liquidation,  
 5 whichever time is shorter.

6 (b) Invalidation of preferences. **Except as provided in subsection (10) of this**  
 7 **section,** any preference may be avoided by the liquidator, if:

- 8 1. The insurer was insolvent at the time of the transfer;~~[, or]~~
- 9 2. The transfer was made within four (4) months before the filing of the  
 10 petition;~~[, or]~~
- 11 3. The creditor receiving it or to be benefited thereby or his agent acting  
 12 with reference thereto had reasonable cause to believe at the time when  
 13 the transfer was made that the insurer was insolvent or was about to  
 14 become insolvent;~~[,]~~ or
- 15 4. The creditor receiving it was an officer, employee, attorney or other  
 16 person who was in fact in a position of comparable influence in the  
 17 insurer to an officer whether or not he held such position, or any  
 18 shareholder holding directly or indirectly more than five percent (5%) of  
 19 any class of any equity security issued by the insurer, or any other person  
 20 with whom the insurer did not deal at arm's length.

21 Where the preference is voidable, the liquidator may recover the property or,  
 22 if it has been converted, its value from any person who has received or  
 23 converted the property, except a bona fide purchaser from or lienor of the  
 24 debtor's transferee for a present fair equivalent value. Where the bona fide  
 25 purchaser or lienor has given less than fair equivalent value, he shall have a  
 26 lien upon the property to the extent of the consideration actually given by him.  
 27 Where a preference by way of lien or security title is voidable, the court may

1           on due notice order the lien or title to be preserved for the benefit of the estate,  
2           in which event the lien or title shall pass to the liquidator.

3   (2)   Perfection of transfers.

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

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

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

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

16      (e)   Actual creditors unnecessary. This subsection applies whether or not there  
17          were creditors who might have obtained liens or persons who might have  
18          become bona fide purchasers.

19   (3)   Liens by legal or equitable proceedings.

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

27      (b)   When liens are superior. A lien obtainable by legal or equitable proceedings



1           could become superior to the rights of a transferee, or a purchaser could obtain  
2           rights superior to the rights of a transferee within the meaning of subsection  
3           (2) of this section, if such consequences would follow only from the lien or  
4           purchase itself, or from the lien or purchase followed by any step wholly  
5           within the control of the respective lienholder or purchaser, with or without  
6           the aid of ministerial action by public officials. Such a lien could not,  
7           however, become superior and such a purchase could not create superior  
8           rights for the purpose of subsection (2) of this section through any acts  
9           subsequent to the obtaining of such a lien or subsequent to such a purchase  
10          which require the agreement or concurrence of any third party or which  
11          require any further judicial action, or ruling.

12 (4) Twenty-one day rule. A transfer of property for or on account of a new and  
13 contemporaneous consideration which is deemed under subsection (2) of this  
14 section to be made or suffered after the transfer because of delay in perfecting it  
15 does not thereby become a transfer for or on account of an antecedent debt if any  
16 acts required by the applicable law to be performed in order to perfect the transfer  
17 as against liens or bona fide purchasers' rights are performed within twenty-one (21)  
18 days or any period expressly allowed by the law, whichever is less. A transfer to  
19 secure a future loan, if such a loan is actually made, or a transfer which becomes  
20 security for a future loan shall have the same effect as a transfer for or on account of  
21 a new and contemporaneous consideration.

22 (5) Indemnifying transfers also voidable. If any lien deemed voidable under paragraph  
23 (b) of subsection (1) of this section has been dissolved by the furnishing of a bond  
24 or other obligation, the surety on which has been indemnified directly or indirectly  
25 by the transfer of or the creation of a lien upon any property of an insurer before the  
26 filing of a petition under this subtitle which results in a liquidation order, the  
27 indemnifying transfer or lien shall also be deemed voidable.

- 1 (6) Avoidance of lien. The property affected by any lien deemed voidable under  
2 paragraph (b) of subsection (1) of this section and subsection (5) of this section is  
3 discharged from the lien, and that property and any of the indemnifying property  
4 transferred to or for the benefit of a surety shall pass to the liquidator, except that  
5 the court may on due notice order the lien to be preserved for the benefit of the  
6 estate and the court may direct that a conveyance be executed which is adequate to  
7 evidence the title of the liquidator.
- 8 (7) Hearings to determine rights. The court shall have summary jurisdiction of any  
9 proceeding by the liquidator to hear and determine the rights of any parties under  
10 this section. Reasonable notice of any hearing in the proceeding shall be given to all  
11 parties in interest, including the obligee of a releasing bond or other like obligation.  
12 Where an order is entered for the recovery of indemnifying property in kind or for  
13 the avoidance of an indemnifying lien, the court, upon application of any party in  
14 interest, shall in the same proceeding ascertain the value of the property or lien, and  
15 if the value is less than the amount for which the property is indemnity or than the  
16 amount of the lien, the transferee or lienholder may elect to retain the property or  
17 lien upon payment of its value, as ascertained by the court, to the liquidator within  
18 such reasonable times as the court fixes.
- 19 (8) Surety's liability discharged. The liability of a surety under a releasing bond or other  
20 like obligation shall be discharged to the extent of the value of the indemnifying  
21 property recovered or the indemnifying lien nullified and avoided or, where the  
22 property is retained under subsection (7) of this section to the extent of the amount  
23 paid to the liquidator.
- 24 (9) Setoff of new advances. If a creditor has been preferred and afterward in good faith  
25 gives the insurer further credit without security of any kind, for property which  
26 becomes a part of the insurer's estate, the amount of the new credit remaining  
27 unpaid at the time of the petition may be set off against the preference which would

1 otherwise be recoverable from him.

2 **(10) Federal home loan bank preferences. A liquidator shall not avoid any preference**  
3 **arising under, or in connection with, a federal home loan bank security**  
4 **agreement or any pledge agreement, security agreement, collateral agreement,**  
5 **guarantee agreement, or other similar arrangement or credit enhancement**  
6 **relating to a security agreement to which a federal home loan bank is a party.**