

# BANKRUPTCY AND TITLE INSURANCE

## For the Washington Land Title Association Examiners Manual

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This material is general in nature, but Sections 7.6 (non-judicial foreclosures), 8.5.2 (homestead exemption amounts) and 8.11 (transfer taxes) contain information that is specific to the following states:

Alaska	Montana
Arizona	Nevada
California	Oregon
Colorado	Utah
Hawaii	Washington
Idaho	Wyoming

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<b>EXHIBIT C</b> .....	Life Cycle of a Bankruptcy
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# BANKRUPTCY AND TITLE INSURANCE

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## 1.0 TITLE INSURANCE

A checklist for insuring property subject to bankruptcy is attached as EXHIBIT B. An abstract form, useful when reviewing the court case, is attached as EXHIBIT A. These forms should be utilized by the examiner when writing any title evidence, including a commitment, preliminary report, policy or guarantee.

Also attached as EXHIBIT C is a chart showing the several bankruptcy plans and the general progression of a case from the perspective of a title insurer.

EXHIBIT D is a discussion of the PACER web service which can provide quick and inexpensive searches of bankruptcies from all bankruptcy courts around the United States.<sup>1</sup>

## 2.0 JURISDICTION

Bankruptcy is governed by federal law which usually supersedes state law when there is a conflict. Our present bankruptcy law is codified in the Bankruptcy Reform Act, 11 U.S.C. §101, *et seq.*, of 1994, as amended numerous times, most recently (as of the date of this material) as of July 21, 2010 (herein “the Code”). Certain rules (herein, with cites, “BR”) were adopted by the U.S. Supreme Court pursuant to 28 U.S.C. §2075, and apply to all bankruptcy courts. There are also local rules in each bankruptcy court that may affect timing and procedural issues. These local rules may vary.

A bankruptcy filing is made in the United States District Court, Bankruptcy Division. If one of these court is located in the same county as the property to be insured, that court should be checked for the existence of a bankruptcy.

The purpose of bankruptcy law is twofold: to give the **debtor** (the party filing bankruptcy) a fresh start and to pay **creditors** in an orderly fashion. The bankruptcy will result in either **liquidation** or **reorganization** of the debtor’s estate.

Bankruptcy may be **voluntary** (filed by the debtor) or **involuntary** (filed by creditors).

Title insurers are concerned about bankruptcy filings because of the effect a filing has upon the debtor’s real property interests. This applies to prior owners in the chain of title as well as the current owner, and can even include interests disposed of by the bankrupt party *before* the bankruptcy was filed.

## 2.1 PROPERTY OF DEBTOR

The bankruptcy court assumes jurisdiction over all of the property that the debtor has at the time the petition for bankruptcy is filed, wherever it is located, and whether or not that property is scheduled as an asset. The court also has jurisdiction over all property acquired by the debtor after the petition is filed but before the case is closed.<sup>2</sup>

Bankruptcy is a “capacity” question that is important in general index searches. However, the debtor may file for bankruptcy in a different jurisdiction than where the property is located, and thus it probably would not be discovered during the typical search and examination. Nonetheless,

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<sup>1</sup> As noted elsewhere in this material, the examiner should not search outside the county in which the property is located unless the existence of the bankruptcy is already known to the title company.

<sup>2</sup> 11 U.S.C. §541

all property of the debtor is affected. The trustee should file notice of the bankruptcy in each jurisdiction where any of the property is located, but this is not always done.

If the title insurer has any reliable knowledge of the bankruptcy (for example, being told of it by the seller, buyer, lender or other party involved in the bankruptcy) an exception for the bankruptcy must be shown, even if all details are not known. See “Paragraph Exception” in §4.3 below on page 7. In addition to possible disclosure by a party to the transaction, if third parties such as the real estate agent or closer indicate that they think a bankruptcy might have been filed, a state or regional counsel or underwriter should be contacted for advice on how to proceed.

Note also that even though notice of the bankruptcy has not been filed locally, the debtor will often advise it’s lender or the title company of the bankruptcy, usually in connection with a pending foreclosure, since one effect of the filing is to stay proceedings in a foreclosure action.

## **2.2 DEATH OF A BANKRUPT**

Bankruptcy rules may permit a bankruptcy to proceed in spite of the death or incompetency of the debtor.<sup>3</sup> Nonetheless, title will have vested at death in the heirs and/or devisees, who will not be a party to the bankruptcy action, so title insurers must consider the interest of those parties, including surviving spouses. (See also “Interest of Spouses” in §2.3 below for the interest of spouses.)

### **COMMENT**

Refer any request to insure without a deed from the heirs or devisees, including a surviving spouse, to a state or regional counsel or underwriter. Consent by these individuals (if not actual joinder in any conveyance) may be required.

## **2.3 INTEREST OF SPOUSES**

The bankruptcy court assumes jurisdiction over all of the interests of the debtor and the debtor’s spouse in community property.<sup>4</sup>

In other instances where only one spouse has filed bankruptcy (such as tenancy by the entirety or joint tenants) the Code states that the trustee may sell the interest of not only the debtor but the other parties in interest.<sup>5</sup> An adversarial proceeding in the bankruptcy would be appropriate, with notice in the county records.

### **COMMENTS**

If title is vested only in a non-debtor spouse, an exception should be shown for the pending bankruptcy of the other spouse. A sale by the non-debtor spouse (when title is vested solely in that spouse) should not be insured without approval from a state or regional counsel or underwriter.

Conversely, when the title to be insured that is vested solely in a debtor and not also in the debtor’s spouse (which spouse may still have some interest, such as a marital lien), the title insurer should generally require a deed from the non-debtor spouse.

Any request to insure a sale property where the debtor is married or the owner is married to a debtor should be referred to a state or regional counsel or underwriter. Among the

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<sup>3</sup> BR 1016

<sup>4</sup> 11 U.S.C. §541(a)(2)

<sup>5</sup> 11 U.S.C. §363(h)



factors to consider will be adequate notice of the bankruptcy to the non-debtor spouse, and the reasonableness of the sale price.

## 2.4 PARTNERSHIPS AND LIMITED LIABILITY COMPANIES

A bankruptcy filing by a general partner in a partnership or a member of a limited liability company may affect ability of that partner or member to participate in the entity or even result in dissolution of the entity.

### COMMENT

Contact a state or regional counsel or underwriter concerning the bankruptcy of a partner of a partnership or member of a limited liability company.

## 2.5 CO-TENANTS

As noted, the trustee has the authority to sell the interest of any co-tenant.<sup>6</sup> For title insurance purposes, the bankruptcy of a co-tenant does not affect the title of the other co-tenants, *but* the court can obtain jurisdiction over them. The trustee can bring an adversary proceeding to sell the interest of the co-tenant, or to partition the property in order to sell the debtor's interest.<sup>7</sup>

### COMMENTS

Show the pending bankruptcy of a co-tenant when vesting non-debtor co-tenants. When there is to be a sale of all co-tenant interests when fewer than all co-tenants are in bankruptcy, the title insurer will generally want a deed from all parties.

Contact a state or regional counsel or underwriter if requested to insure without such a deed. Lacking affirmative consent by the co-tenants, among the factors to be considered are adequate notice to the parties and the reasonableness of the sale price.

## 3.0 BANKRUPTCY CHAPTERS

There are four chapters of the Bankruptcy Code that title insurers will commonly see debtors use. A fifth, Chapter 9, is for municipalities, and is not discussed in this material.

### COMMENT

Contact a state or regional counsel or underwriter if requested to insure any transaction involving any public, governmental or quasi-governmental entity.

These four chapters of particular interest to title insurers and their main features are as follows:

### 3.1 CHAPTER 7 (“LIQUIDATION”)

This is a **liquidation** of all the debtor's non-exempt assets for distribution to creditors. An individual or a business may file under Chapter 7.

1. A **trustee** is appointed.
2. The debtor may exempt certain property.

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<sup>6</sup> 11 U.S.C. §363(h)

<sup>7</sup> *Bankruptcy of Lyons*, U.S.C.A., 9th 93 WSW A.R. 291

3. An individual debtor may obtain a discharge from personal liability on debts. Partnerships, corporations and similar entities are *liquidated* and do not receive a discharge.<sup>8</sup>
4. Unsecured creditors may receive no payment.

After completion of the bankruptcy and **discharge** of an individual Chapter 7 debtor, that individual debtor may not file again for eight (8) years.<sup>9</sup>

As noted above, a corporation would not have survived the bankruptcy and thus there is no **discharge**. Because it was liquidated, the same entity should not be selling the property later (although a new entity may have been created with the same name after the other one was liquidated).

#### COMMENT

Contact a state or regional counsel or underwriter if there are any questions about the current bankruptcy of a party that apparently filed a Chapter 7 within the previous eight years.

### 3.2 CHAPTER 11 (BUSINESS REORGANIZATION)

This is a **reorganization** (rehabilitation) of a business, whether it is a corporation, partnership, limited liability company, sole proprietorship, individual, etc. It results in a **plan** for the continuing operation of the business.

1. A trustee may be appointed. If not, the **debtor** is granted the same powers of a trustee. When that happens, the debtor is referred to as a **debtor-in-possession**. The debtor-in-possession may do anything a trustee would do in the “**normal (or ordinary) course of business**” of the debtor’s business. However, any activity, including a sale, lease or mortgage of real property, which is outside the debtor’s normal course of business (unless the plan already specifically provides for it) must be approved by the court, whether or not there is a trustee.

#### COMMENT

It is sometimes difficult for a title examiner to determine whether or not an action is in the “normal course of business.” (See also “Authority to Sell in a Plan” in §8.4.1 below on page 24.) Contact a state or regional counsel or underwriter if there is any question whether the transaction to be insured is properly considered to be in the normal course of business and does not need a court order or provision in the plan.

2. A plan of reorganization must be filed and approved by the court. It will set forth detailed information on who will be paid, how much, when, etc. A secured creditor is normally entitled to payment in full from the collateral for its loan.

The plan governs the proceedings. Many actions contemplated by the Code do not apply if the plan provides otherwise. Creditors may object to the plan, and in some circumstances may submit their own plan.

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<sup>8</sup> 11 U.S.C. §727(a)(1)

<sup>9</sup> 11 U.S.C. §727(a)(8)&(9)

#### COMMENT

The title insurer will look for specific plan approval (or separate court order approving the action) of the transaction to be insured.

With respect to a **discharge** under this plan, there are two things to keep in mind:

- (1) **discharge** in a Chapter 11 plan occurs upon **confirmation** (not *completion*) of the plan unless otherwise provided in the plan<sup>10</sup>, except that
- (2) **discharge** for an individual in a Chapter 11 occurs upon **completion** of the plan.<sup>11</sup> (Compare this to a Chapter 13 plan, where discharge occurs upon completion of the plan; see “Chapter 13 (Wage Earner)” in §3.4 below.)

Remember that a discharge is generally irrelevant to a title insurer. See also “Effect of Confirmation” in §8.4.5 below on page 26 and “Effect of Discharge” in §11.0 below on page 37, particularly “Liens not Affected by Discharge” in §11.2 below on page 38.

The bankruptcy court retains jurisdiction as to a non-exempt asset until the plan is completed, *even if the bankruptcy case is closed*, or until that asset is sold pursuant to the plan.

#### COMMENT

When writing a commitment, preliminary report, policy or guarantee on a non-exempt asset before the plan is completed, an exception for the pending bankruptcy must be shown. Contact a state or regional counsel or underwriter if requested to ignore the pendency of the bankruptcy case. Similarly, any previous bankruptcy filed within eight (8) years prior to the date of the title search should be shown as an exception, even if that previous bankruptcy case is “closed.” Elimination of the exception will require review of the plan and all modifications of it, including a determination as to whether the plan has been completed.

### 3.3 CHAPTER 12 (FAMILY FARM OR FISHERMAN REORGANIZATION)

This **reorganization** is similar to a Chapter 11, but reserved for farms and fishermen.

1. The farmer must file a **plan** but the process is shorter than for a business under Chapter 11 or for an individual under Chapter 13. It is intended to be less likely to result in liquidation, as under a Chapter 11, and the debt limits are higher than in a Chapter 13.
2. Unsecured creditors receive substantially less protection than under a Chapter 11 filing.

### 3.4 CHAPTER 13 (WAGE EARNER)

This is a **reorganization** of the debts of an individual. It also results in a plan.

1. A trustee is appointed.
2. The debtor files a plan of payment, which must be approved by the court. Most likely the plan will provide for partial payment. The creditors may challenge the plan.
3. Unlike the usual discharge in a Chapter 11 plan (see “Chapter 11 (Business Reorganization)” in §3.2 above on page 4, **discharge** occurs upon **completion** of plan

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<sup>10</sup> 11 U.S.C. §1141(d)(1)(A)

<sup>11</sup> 11 U.S.C. §1141(d)(5)

(not *confirmation*). 11 U.S.C. §1328(a). (See also “Effect of Confirmation” in §8.4.5 below on page 26 and “Effect of Discharge” in §11.0 below on page 37.)

4. A discharge under a Chapter 13 bankruptcy may be available to the debtor prior to completion of the plan in limited circumstances. 11 U.S.C. §1328(b). This is sometimes referred to as a “hardship” discharge.

**COMMENT**

If a “hardship” discharge is encountered, contact a state or regional counsel or underwriter before eliminating exceptions for any judgments or security interests in reliance upon such a discharge.

As with *all* bankruptcies, however, ***discharge will not eliminate a lien on land owned when the bankruptcy is filed.*** See “Liens not Affected by Discharge” in §11.2 below on page 38.

However, the discharge will be needed before ignoring such liens on ***land acquired after the bankruptcy was filed.***

5. The plan must provide for completion within three (3) years but extensions for up to an additional two (2) years may be granted by the court.
6. The debtor is not prevented from refiled again at any time. However, the ability to get another discharge is limited. A discharge would not be granted if an earlier discharge was granted during the preceding four (4) years under a Chapter 7, 11 or 12 bankruptcy, nor if an earlier discharge was granted during the preceding two (2) years under a Chapter 13 bankruptcy. 11 U.S.C. §1328(f).

Remember that a discharge is generally irrelevant to a title insurer. See also “Effect of Confirmation” in §8.4.5 below on page 26 and “Effect of Discharge” in §11.0 below, particularly “Liens not Affected by Discharge” in §11.2 below on page 38.

As in a Chapter 11, the bankruptcy court retains jurisdiction as to a non-exempt asset until the plan is completed, *even if the bankruptcy case is closed*, or until that asset is sold pursuant to the plan.

**COMMENT**

An exception for the pending bankruptcy must be shown in a commitment, preliminary report, policy or guarantee at least until the case is closed ***and completed.*** Contact a state or regional counsel or underwriter if requested to ignore the pendency of the bankruptcy case. Similarly, any previous bankruptcy filed within four (4) years prior to the date of the title search should be shown as an exception, even if that previous bankruptcy case is “closed.”

Before removing the exception for the bankruptcy the plan and all modifications must be reviewed to confirm that: (1) the plan is completed and (2) the bankruptcy is closed.

This does not apply to a sale of an exempt residence. See “Exempt Property (Including Homestead)” in §8.5 below on page 26 and “Exempt Property” in §10.2 below on page 35 for a discussion of exempt property.

### 3.5 CONVERSION BETWEEN CHAPTERS

Any case filed under any chapter can be converted to another chapter.

## 4.0 TITLE TO REAL PROPERTY

As long as the debtor is in bankruptcy, the debtor and the property are subject to the jurisdiction of the court unless the property has been abandoned.

### COMMENT

In other words, the **property of the estate** is still subject to the jurisdiction of the bankruptcy court until the case is closed, even when there is a Chapter 11, 12 or 13 plan that has been approved and is still being administered. See “How the Stay is Lifted” in §7.3 below on page 12 for a discussion of **property of the estate**.

## 4.1 VESTING OF TITLE

The filing of bankruptcy does not affect the vesting of title. The title of the debtor does not re-vest in the trustee, assuming one is appointed, but continues to be held by the debtor (albeit subject to the bankruptcy estate created by the filing). Therefore, title should continue to “vest” in the debtor the same as if no bankruptcy has been filed, while any commitment, preliminary report policy or guarantee would show the pending bankruptcy as a Schedule B exception.

Note also that while a Chapter 11 debtor may also be a “**debtor-in-possession**” (see “Chapter 11 (Business Reorganization)” in §3.2 above on page 4) this designation *should not* be added to the vesting recitals in any commitment, preliminary report, policy or guarantee.

## 4.2 CONVEYANCE OF DEBTOR’S PROPERTY

Notwithstanding the continued vesting of title in the debtor, a trustee, if one has been appointed, would convey any non-exempt property *except* usually in the case of a “debtor-in-possession” in a Chapter 11 bankruptcy. See also “Chapter 11 (Business Reorganization)” in §3.2 above on page 4.

### COMMENT

In other words, the trustee normally administers the estate of the bankrupt, with the authority to sell non-exempt assets, *except* that in some Chapter 11 cases, no trustee is appointed and the debtor, referred to as a **debtor-in-possession** (see “Chapter 11 (Business Reorganization)” in §3.2 above on page 4) has certain powers of a trustee.<sup>12</sup> (See also “Authority to Sign Deed” in §8.2.4 below on page 21.)

## 4.3 PARAGRAPH EXCEPTION

An exception for the pendency of the bankruptcy must always be shown in any title evidences (including commitments, preliminary reports, policies and guarantees). Such an exception should read substantially as follows:

\_\_\_\_\_. Pendency of United States Bankruptcy Court, for [*insert court where case is filed*]  
Case No. : [*insert case number*]  
Wherein : [*insert name of debtor(s)*]  
filed a petition for bankruptcy.  
On : [*insert date of filing*]  
Trustee : [*insert name of bankruptcy trustee*]

<sup>12</sup> 11 U.S.C. §1142(b) (“The court may direct the debtor and any other necessary party to execute or deliver or to join in execution of delivery of any instrument required to effect a transfer of property dealt with by confirmed plan, and to perform any other act, including the satisfaction of any lien that is necessary for the consummation of the plan.”) and BR 6004(f)(2); see also 11 U.S.C. §363(b)

Attorney for Debtor : [insert name of debtor's attorney]

Any transactions involving this property must be made pursuant to a confirmed plan or by proper bankruptcy court order. A copy of the plan and/or court order should be presented to the Company.

This exception would appear in any title evidence (commitment, preliminary report or guarantee) written during the pendency of the bankruptcy, even if there is a confirmed plan. It would be deleted only after a sale, as permitted by the court (but not after an approved mortgage given during a plan; see "Sale or Mortgage During Bankruptcy" in §8.0 below on page 20 and "Mortgages" in §8.8 below on page 31) or after the case is closed and, if there is a plan, that plan is completed.

If the property has been declared **exempt** (see "Exempt Property (Including Homestead) in §8.5 below on page 26 and "Exempt Property" in §10.2 below on page 35) or **abandoned** (see "Abandoned Property (No Asset or No Distribution)" in §8.6 below on page 28) in the bankruptcy, it is recommended that the above exception be shown in a commitment, preliminary report, policy or guarantee, with the following added:

Said premises have been abandoned [or, if applicable: are exempt].

The transaction can be insured (a policy issued for a sale or mortgage by the debtor) in this situation without further court approval, however, and the exception, and this added note, deleted.

Show the exception the local title search discloses, or there is reliable information (from the parties to the transaction, for example) that a bankruptcy is filed. If all details are not known the paragraph may need to be modified accordingly (delete reference to a case number, the name of the trustee, etc.)

#### COMMENTS

**IMPORTANT:** Show an exception for a known bankruptcy, even if it's assumed to be in another jurisdiction. Note that the exception is not based on a search of records, but rather information that is obtained outside of the search process (matters known to the insurer). The exception need not include all of the case information shown in the above example, unless it is known.

However, **DO NOT** include a statement to the effect that "records have [not] been searched" for a bankruptcy. It is necessary to show an exception for the possibility of a bankruptcy, but any additional comment or statement might suggest or imply responsibility for searching records outside the county where the property is located, which not appropriate under the provisions of a commitment, preliminary report, guarantee or policy.

The only records to be searched are those located in the county where the property is located, and which are covered in the local "general index" search. However, if there is a bankruptcy court in the same county, the title insurer is responsible for searching that bankruptcy court's records.

Attached as EXHIBIT A is a suggested form of examiner's "abstract" for use when reviewing the bankruptcy court file.

## 5.0 PRE-PETITION TRANSFERS

A bankruptcy filing may affect transfers made by the bankrupt prior to such filing. The court has the power to set aside transfers based on **preference (preferential transfers)** or fraud (**fraudulent transfers**).

Note that the term “fraudulent” in context of a bankruptcy is not used in a criminal sense.

A bankruptcy trustee has broad powers including all the power of a bona fide purchaser for value. A trustee may upset a transaction that occurred up to two years before the bankruptcy in some circumstances, such as if the debtor was insolvent or made insolvent by the transaction, or if the debtor entered into the transaction to hinder, delay, or defraud creditors.

### 5.1 “PREFERENCE” DEFINED

A **preference** is a transfer of the debtor’s property:

1. to a creditor for a debt owed before the transfer,
2. within 90 days of a bankruptcy filing, and
3. that enables the creditor to receive more than the creditor would have received out of the bankruptcy.<sup>13</sup>

### 5.2 “FRAUDULENT TRANSFER” DEFINED

The trustee may void a **fraudulent transfer**, which is any transfer of the debtor’s property within two (2) years (or within ten (10) years for transfers to a self-settled trust – e.g., a “living” or inter vivos trust) prior to bankruptcy if the debtor received less than a “reasonably equivalent value” in exchange for the transfer and was insolvent on the date of the transfer.<sup>14</sup>

“Transfer” includes a deed in lieu of foreclosure or deed in lieu of forfeiture (e.g., relating to a real estate contract).

Until recently, a non-judicial foreclosure (trustee’s sale under a deed of trust with the power of sale) or judicial foreclosure had both been considered a possible preference under the Code.<sup>15</sup> Even though a sale to a bona fide purchaser prevented the trustee from recovering the property, the trustee could still sue the original transferee for monetary damages. This is no longer the case.<sup>16</sup> Now, the price paid at a real estate mortgage foreclosure sale is “reasonably equivalent value” under §548 of the Code.

A mutual agreement between a landlord and tenant prematurely terminating a lease may also be deemed a fraudulent conveyance, permitting a bankruptcy trustee to set aside the termination agreement.<sup>17</sup>

### 5.3 EFFECT OF FRAUDULENT TRANSFER

The trustee may recover for the benefit of the bankrupt’s estate the property fraudulently transferred.<sup>18</sup>

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<sup>13</sup> 11 U.S.C. §547

<sup>14</sup> 11 U.S.C. §548

<sup>15</sup> *Durrett v. Washington National Insurance*, 621 F.2d 201 (5th Cir. 1980) & 11 U.S.C. §548(a)

<sup>16</sup> *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994)

<sup>17</sup> *Edward Harvey Company, Inc. v. Carroll L. Cheverie, Jr.*, 68 Bankr. Rptr. 851 (D. Mass. 1987)

<sup>18</sup> 11 U.S.C. §550(a)

However, the trustee cannot recover the property from a subsequent purchaser from the initial transferee if that purchaser paid “value” and was “without knowledge of the voidability of the transfer” provided the subsequent transferee takes in good faith and without knowledge of the transfer.<sup>19</sup>

#### COMMENTS

Nonetheless, title should not be insured on this basis without consulting a state or regional counsel or underwriter.

### 5.4 INSURING “INVOLUNTARY” TRANSFERS

A title insurer will be reluctant to insure a title derived through a deed in lieu of foreclosure where the deed was given within one year before a bankruptcy was filed by the grantor.

#### COMMENTS

However, title derived through a trustee’s sale or sheriff’s deed should be insurable if the title insurer is satisfied that the sale was properly conducted (see “ “Fraudulent Transfer” Defined” in §5.2 above on page 9).<sup>20</sup> Nonetheless, any questions about the sufficiency of the foreclosure proceedings should be referred to a state or regional counsel or underwriter.

### 6.0 UNAUTHORIZED POST-PETITION TRANSFERS

The trustee may set aside any unauthorized transfer of the debtor’s property which occurs after the petition for bankruptcy has been filed.<sup>21</sup>

However, the trustee may not void such a transfer to:

1. a good faith purchaser
2. without knowledge of the bankruptcy
3. who gives “fair equivalent value.”<sup>22</sup>

unless notice of the bankruptcy petition is filed with the recorder of the county where the property is located.

Notwithstanding this **bona fide purchaser** protection, a title insurer will probably not insure any unauthorized post-petition transfers where any form of notice has been received or if the title insurer has any knowledge of the bankruptcy of the transferor.

### 7.0 AUTOMATIC STAY

All bankruptcy filings have certain features in common. One of these is the **automatic stay**. There is often confusion, even among attorneys, about the effects of the automatic stay.

#### 7.1 STAY PROTECTS DEBTOR’S PROPERTY

The Code provides that upon filing the Petition for Relief, both the debtor and the debtor’s property are protected against further actions by creditors.<sup>23</sup> Sometimes petitions are filed solely

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<sup>19</sup> 11 U.S.C. §550(b)

<sup>20</sup> See *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994)

<sup>21</sup> 11 U.S.C. §549(a)

<sup>22</sup> 11 U.S.C. §549(c)

<sup>23</sup> 11 U.S.C. §362



to obtain this relief even if it is temporary. Any action taken by a creditor in violation of the stay is void.

The bankruptcy petition must disclose all of the debtor's property interests, any pending suits the debtor is involved in, and all debts. If a debt is not disclosed in the schedules, it cannot be discharged. All creditors that are scheduled are sent notice of the filing and instructions on filing a claim.

However, it is not necessary that the creditor have knowledge of or receive notice of the bankruptcy. The stay is automatic and protects all of the debtor's property wherever located.

1. Actions by creditors that are stayed:
  - a. Collection activities.
  - b. Enforcement of a judgment.
  - c. Creation, perfection, or enforcement of liens.

**COMMENTS**

However, a title insurer should not ignore any lien or make any decision on the relative priorities of liens that are filed after the date of the filing of the bankruptcy. The bankruptcy code gives particular protection to certain types of liens, including labor and material liens, real estate taxes and Uniform Commercial Code financing statements.<sup>24</sup> See also "Labor or Material Liens" in §7.5 below on page 12.

- d. Commencement or continuation of a court action (outside of bankruptcy court) to recover a debt.
2. Actions that may continue despite the existence of the stay:
    - a. Criminal proceedings.
    - b. Collection of domestic support obligations support from the debtor's exempt property.
    - c. Governmental regulatory actions.
    - d. Certain actions by the Secretary of HUD to foreclose liens.
    - e. Issuance of notice of a tax deficiency to the debtor.
    - f. Certain other actions in limited and special circumstances.
    - g. Bad faith filings.
    - h. Leaseholds of residential real estate.

## **7.2 RELIEF FROM AUTOMATIC STAY**

The automatic stay continues until either the property is no longer subject to the jurisdiction of the bankruptcy court (closing or dismissing the case, for example) or an order is entered lifting the stay.<sup>25</sup> Only the bankruptcy court can lift the stay; state courts do not have that power.

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<sup>24</sup> 11 U.S.C. §546(b)

<sup>25</sup> 11 U.S.C. §362(c)(1) and (d)

### 7.3 HOW THE STAY IS LIFTED

1. As to the debtor and the debtor's **exempt property** (see "Exempt Property (Including Homestead)" in §8.5 below on page 26 and "Exempt Property" in §10.2 below on page 35), the stay is lifted:
  - a. by a discharge, or
  - b. by a dismissal of the case, or
  - c. by a court order permitting a creditor to proceed (usually in a foreclosure).
2. For title insurance purposes, as to **property of the estate**, the stay is lifted:
  - a. by abandonment of the property (see "Abandoned Property (No Asset or No Distribution)" in §8.6 below on page 28); or
  - b. by dismissal of the case, or
  - c. by court order.

No bankruptcy court order will ordinarily be required to lift the stay on **exempt** property, which is to be distinguished from **property of the estate**. "Property of the estate" is essentially non-exempt property. See "Exempt Property (Including Homestead)" in §8.5 below on page 26 and "Exempt Property" in §10.2 below on page 35 for a discussion of exempt property.

Non-exempt property may also be abandoned; see "Abandoned Property (No Asset or No Distribution)" in §8.6 below on page 28. An order approving the abandonment should be entered. A letter or verbal statement from the trustee purporting to disclaim any interest in the property should not be considered sufficient for title insurance purposes. If the trustee offers such letter or opinion disclaiming any interest in the property rather than a formal abandonment, contact a state or regional counsel or underwriter.

#### COMMENT

Note that a **discharge** of the debtor does not release the automatic stay on actions against **property of the estate**. See also "Effect of Discharge" in §11.0 below on page 37 concerning the effect of a discharge.

### 7.4 REDEMPTION AFTER FORECLOSURE

If the debtor files for bankruptcy during any statutory redemption period after foreclosure, the expiration of that redemption period is extended by the bankruptcy filing. Contact a state or regional counsel or underwriter if there is an attempt at redemption during the pendency of the bankruptcy.

Refer also to "Pending Non-Judicial Foreclosure" in §7.6 below on page 13 for a discussion of other foreclosure issues.

### 7.5 LABOR OR MATERIAL LIENS

If the debtor files for bankruptcy after a statutory labor or material lien has been recorded against the debtor's property, the statutory period for the lien creditor to file suit to foreclose that lien is stayed by the bankruptcy filing.<sup>26</sup>

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<sup>26</sup> 11 U.S.C. §362(a)(4)

As to a labor or material lien claimant, a bankruptcy filing by that party will also extend the statutory time periods for *filing its lien* or *enforcing its filed lien*. Obviously, as to an inchoate lien (a statutory lien right when nothing has been recorded) a title insurer would not normally be aware of the bankruptcy of a potential lien claimant when no liens have been recorded.

**COMMENT**

However, if any liens are recorded, the name of all known lien claimants must be run in the general index for possible bankruptcy of the lien claimant, *even if such liens might otherwise be ignored because the time period for enforcing them has passed* without any apparent action to foreclose.

See also “Stay Protects Debtor’s Property” in §7.1 above on page 10 for the effect of the *automatic stay* on the priority of labor and material liens.

## **7.6 PENDING NON-JUDICIAL FORECLOSURE**

Because the non-judicial foreclosure procedure is statutory, it is strictly construed by the courts. How the deed of trust trustee must handle a bankruptcy stay and its lifting depends upon the stage of the foreclosure at the time of the stay. Sometimes the **order lifting the stay** will provide at what point the foreclosure may resume.

This material is not intended to address foreclosure issues impacting title except to the extent affected by bankruptcy of the debtor.

If a lender wants to foreclose after the property has been abandoned, an order lifting the stay is required, and would be required by a title insurer asked to insure through a foreclosure after the property was abandoned.<sup>27</sup>

**COMMENT**

Generally, unless there is a specific state statute outlining a procedure to proceed with a non-judicial foreclosure that was interrupted by a bankruptcy filing, the foreclosure should be started anew. Any request to insure based upon a non-judicial deed of trust foreclosure which was interrupted by the filing of a bankruptcy petition should be referred to a state or regional counsel or underwriter.

Refer to the following sections for additional comments for certain Western states, effective as of the date of this material.

### **7.6.1 ALASKA**

Non-judicial foreclosure of a deed of trust, by a trustee sale at public auction, is permitted in Alaska pursuant to AS 34.20.070, so long as certain requirements are met. AS 34.20.080(e) further provides that the trustee may postpone the scheduled sale multiple times by giving notice as provided in that section.

However, neither Alaska statutes nor case law address the particulars of what is “supposed to happen” when a debtor declares bankruptcy under the federal bankruptcy code while a non-judicial foreclosure is pending.

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<sup>27</sup> 11 U.S.C. §362(d)

**COMMENT**

Any request to insure based upon a non-judicial deed of trust foreclosure which was interrupted by the filing of a bankruptcy petition should be referred to a state or regional counsel or underwriter, unless the foreclosure was started anew.

**7.6.2 ARIZONA**

Arizona Revised Statutes 33-810 C. provides that a sale shall not be complete if the sale as held is contrary to or in violation of any federal statute in effect because of an unknown or undisclosed bankruptcy. A sale so held shall be deemed to be continued to a date, time and place announced by the trustee at the sale and shall comply with subsection B of this section or, if not announced, shall be continued to the same place and at the same time twenty-eight days later, unless the twenty-eighth day falls on a Saturday or legal holiday, in which event it shall be continued to the first business day thereafter.

In the event a sale is continued because of an unknown or undisclosed bankruptcy, the trustee shall notify by registered or certified mail, with postage prepaid, all bidders who provide their names, addresses and telephone numbers in writing to the party conducting the sale of the continuation of the sale.

**COMMENT**

Nonetheless – and regardless of whether a trustee had notice of a pending bankruptcy or not – any request to insure a purchaser at a non-judicial foreclosure that is in violation of a bankruptcy stay, or a non-judicial foreclosure that is resumed following the lifting of the stay, must be referred to a state or regional counsel or underwriter.

**7.6.3 CALIFORNIA**

Pursuant to C.C. § 2924g(e), a non-judicial foreclosure sale in California may be conducted at the *expiration* of the automatic stay in bankruptcy *without the necessity* of waiting the additional seven (7) day period of time prescribed in C.C. § 2924g(d).

Therefore, a non-judicial foreclosure sale may be conducted when the following has transpired:

1. the order granting relief from the automatic stay has been entered on the bankruptcy court docket, and
2. fourteen (14) days has expired after the order granting relief from the automatic stay has been entered on the bankruptcy court docket, and
3. no appeal or order granting a stay pending an appeal has been filed.

Please note that the above time period may be altered or rendered inapplicable by the court in the order granting relief from the automatic stay.

**COMMENT**

Contact a state or regional counsel or underwriter if requested to insure based on this procedure.

## 7.6.4 COLORADO

Colorado Revised Statutes 38-38-109 (2) (a) provides that if all publications of the combined notice prescribed by section 38-38-103 (5) or by section 13-56-201 (1) *have been completed* before a bankruptcy petition has been filed which automatically stays the officer from conducting the foreclosure sale, then the officer shall (1) announce, post or provided notice of that fact on the then-scheduled date of sale, (2) take no action at the then-scheduled sale, and (3) allow the sale to be automatically continued from week to week in accordance with 38-38-109 (1) (a), unless otherwise requested in writing prior to any such date of sale by the holder of the evident of debt or the attorney for that holder.

On the other hand, 38-38-109 (2) (b) provides that if (1) the publications of the combined notice of sale prescribed by section 38-38-103 (5) or by section 13-56-201 (1) C.R.S. *have not been started* or (2) *all* of the publications *have not been completed* before the day a bankruptcy petition has been filed that automatically stays the officer from conducting the sale, the officer shall (1) immediately cancel any remaining publications of the combined notice, and (2), on the date set for the sale, announce, post or provide a notice that the sale has been enjoined or has been stayed by the automatic stay provisions of the federal bankruptcy code. In addition, it says that the sale *shall not* be continued under the standard statutory continuation provisions of 38-38-109 (1) (a).

For a sale by the *public trustee*, the public trustee shall rerecord the notice of election and demand and proceed with all additional foreclosure procedures provided by this article, as though the foreclosure had just been commenced, upon (1) the termination of any injunction or upon the entry of a bankruptcy court order dismissing the bankruptcy case, or (2) abandoning the property being foreclosed, or (3) closing the bankruptcy case, or (4) granting relief from the automatic stay, and (4) receipt of a request from the holder of the evidence of debt or the attorney for that holder to restart the action. The notice shall be rerecorded within ten business days of the request.

For a sale by the *sheriff* under either a statutory or judicial foreclosure or upon execution and levy pursuant to court order or decree, upon the notification of (1) termination of any injunction or (2) upon the entry of a bankruptcy court order either dismissing the bankruptcy case or abandoning the property being foreclosed, or closing the bankruptcy case, or granting relief from the automatic stay, the sheriff shall establish a new date of sale and republish a new combined notice pursuant to section 13-56-201 (1).

Note also that if a sale is held in violation of the automatic stay, and an order is subsequently entered the bankruptcy case that either (1) dismisses the bankruptcy, or abandons the property or closes the bankruptcy case, or (2) grants relief from the automatic stay, then the evidence of debt and the deed of trust or other lien being foreclosed shall immediately be deemed reinstated, and it shall have the same priority as if the sale had not occurred. The reinstatement shall be confirmed by the officer's indorsement on either the original evidence of debt and deed of trust or other lien (if deposited with the officer), or a copy (if one has been submitted pursuant to section 38-38-101 (1) C.R.S.). The statute provides language for the indorsement form.

Note, however, that the failure to indorse doesn't affect the validity of the reinstatement.

Immediately upon reinstatement, any power of sale is deemed revived.

**COMMENT**

Contact a state or regional counsel or underwriter if requested to insure based on this procedure.

Note also that the filing of a bankruptcy will affect a borrower's rights under workout procedures available to a borrower under the "foreclosure deferment" statute (*see* C.R.S. 38-38-804 & .805.)

**7.6.5 HAWAII**

Hawaii statutes do not address a bankruptcy's effect on a foreclosure, nor any interruption of a foreclosure by an act of the borrower. HRS 667-5 provides in part "...Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf."

HRS 667-28(a) provides that the public sale may be either postponed or canceled by the foreclosing mortgagee, with notice of the postponement or the cancellation of the public sale (1) announced by the foreclosing mortgagee at the date, time, and place of the last scheduled public sale, and (2) provided, upon request, to any other person who is entitled to receive the notice of default under section 667-22(c).

HRS 667-28 (b) further provides that if the public sale is postponed, a new public notice of the sale shall be published once in the format described in HRS 667-27, which shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen (14) days after the date of the publication of the new public notice. No sooner than fourteen (14) days before the date of the public sale, a copy of the new public notice shall be posted on the mortgaged property (or on such other real property of which the mortgaged property is a part), and shall be mailed or delivered to the mortgagor, to the borrower, and to any other person entitled to receive notice under section HRS 667-27.

**COMMENT**

Notwithstanding that judicial foreclosure and private power foreclosure under power of sale proceedings may be recommenced when a bankruptcy stay is lifted, contact a state or regional counsel or underwriter if requested to insure a purchaser at a judicial or non-judicial foreclosure that is in violation of a bankruptcy stay, or for any non-judicial foreclosure that is resumed following the lifting of the stay. This is particularly important if there is any question about the right of the borrower to cure a default.

**7.6.6 IDAHO**

I.C. §§45-1506A and 45-1506B provide for additional notice, including publication, at least 30 days before the rescheduled sale date. If the stay is "lifted" prior to the scheduled sale date, the sale can be postponed for a period of time which would allow at least 115 days to elapse from the recording of the notice of default to the rescheduled date exclusive of the stay period. The actual provisions vary depending on the stage of the foreclosure proceeding at the time of the stay. The foreclosure trustee must also execute an affidavit stating compliance with the statutes.

**COMMENT**

A sale out of the bankruptcy court, with no express order lifting the stay, is not to be interpreted as a "lifting" of the stay for purposes of permitting abbreviated notices or

continuation of a foreclosure under this statute. In such cases the court should enter an order “lifting” the stay.

In general, any request to insure through foreclosure proceedings that are recommenced after the stay is lifted are to a state or regional counsel or underwriter.

### **7.6.7 MONTANA**

MCA 71-1-315(3) provides only that a non-judicial foreclosure may be postponed because of a bankruptcy stay, but each postponement may not exceed 30 days and all postponements may not exceed, in the aggregate, 120 days. Each postponement must be effected by a public proclamation at the time and place fixed in the notice of sale or fixed by previous postponement. No other notice of the postponed sale need be given.

#### **COMMENT**

Nonetheless, a state or regional counsel or underwriter must be contacted if there is a request to insure a purchaser at a non-judicial foreclosure sale pursuant to this statute (assuming the stay was lifted within the 120-day period).

If the stay is for a longer period, the foreclosure proceedings must be started anew, once the stay is lifted.

### **7.6.8 NEVADA**

NRS 107-550 provides that a non-judicial foreclosure under NRS 107-080 must be rescinded and any pending foreclosure cancelled if under it is not conducted within 90 calendar days after notice of sale is recorded pursuant to §§4 of NRS 107-080; HOWEVER, that time period is tolled if the borrower files for bankruptcy under Chapters 7, 11, 12 or 13, until the bankruptcy court enters an order (1) closing or dismissing the bankruptcy case or (2) granting relief from the stay.

#### **COMMENT**

Any request to insure based upon a non-judicial deed of trust foreclosure which was interrupted by the filing of a bankruptcy petition should be referred to a state or regional counsel or underwriter to confirm proper adherence to NRS 107-080 and proper resumption of the process, including calculating the necessary time periods.

### **7.6.9 OREGON**

ORS 86.782(12)(a) provides that after “release” from the bankruptcy stay, foreclosure proceedings can continue as if uninterrupted, if, within 30 days after such release the foreclosure trustee gives an amended notice of the sale. The amended notice shall (1) be given at least 15 days prior to the amended sale date, (2) set an amended sale date (which can be the original date or the postponed sale date, but meeting the requirements of ORS 86.764 and 86.774), (3) specify the time and place of the sale, (4) conform to requirements of ORS 86.771, and (5) state that the original proceedings were stayed and the date the stay was terminated.

The amended notice is to be given to by registered or certified mail to the last known address of (1) the persons listed in ORS 86.764 and 86.774(1) (grantor, successor(s), those who’ve requested notice under ORS 86.806, lienholders – including those whose lien arose after the date of the deed of trust – occupants, etc.), (2) each person who was present for the originally

scheduled but delayed sale (suggesting that the trustee needs to attend the cancelled sale and collect that information), and (3) each member of the Oregon State Bar who requests the amended notice. A “true copy” of the amended notice must also be posted to the trustee’s website.

**COMMENT**

A sale out of the bankruptcy court, with no express order lifting the stay, should not be interpreted as a “release” from the stay for purposes of permitting a foreclosure under this statute. In such cases the court should enter an order “releasing” the stay, or foreclosure proceedings should be started anew. Contact a state or regional counsel or underwriter if there are any questions about this procedure.

**7.6.10 UTAH**

There are no provisions in Utah statutes dealing with foreclosure and bankruptcy. Provisions of UCA 57-1-27(2) provide that the person conducting the sale may, for any cause considered expedient, postpone the sale. The person conducting the sale shall give notice of each postponement by public declaration, by written notice or oral postponement, at the time and place last appointed for the sale. No other notice of the postponed sale is required, unless the postponement exceeds 45 days. In that event, the sale shall be re-noticed in the same manner as the original notice of sale is required to be given.

**COMMENT**

If there are any questions about a non-judicial deed of trust foreclosure which was interrupted by the filing of a bankruptcy petition, refer them to a state or regional counsel or underwriter.

**7.6.11 WASHINGTON**

RCW 61.24.130(4) authorizes the deed of trust trustee to set a new sale date when the original sale date was stayed as a result of the filing of a bankruptcy petition *and* an order in the bankruptcy court (1) lifts the stay, or (2) closes or dismisses the case, or (3) discharges the debtor (all with the effect of removing the stay). The new foreclosure sale date shall not be less than 45 days after the date of the bankruptcy court order lifting the stay.

The deed of trust trustee must comply with RCW 61.24.040(1) starting with §§(a) through §§(f) at least thirty days before the new sale date by recording and posting a new notice of trustee’s sale and transmitting it to the grantor and borrower, lienholders – including those intervening between the date of the deed of trust *and the new notice* – vendees, lessees, etc. The new notice must be published once between the 35<sup>th</sup> day and the 28<sup>th</sup> day before the new sale date and once between the 14<sup>th</sup> day and the 7<sup>th</sup> day before the sale.

Also, if the trustee has properly postponed the sale prior to the imposition of the stay, the sale can still occur on the postponed date following termination of the stay. RCW 61.24.130(5).

**COMMENT**

If there are any questions about a non-judicial deed of trust foreclosure which was interrupted by the filing of a bankruptcy petition, refer them to a state or regional counsel or underwriter.



## 7.6.12 WYOMING

Non-judicial foreclosure of a deed of trust or mortgage with power of sale is permitted in Wyoming pursuant to Wyo. Stat. Chapters 34-3 (deeds of trust) and 34-4 (mortgages with power of sale), so long as certain notice and other requirements are met. Although the deed of trust chapter does not expressly permit postponement of the foreclosure sale by the trustee, WS 34-4-109 provides that “a foreclosure sale” may be postponed by giving notice as provided therein.

Wyoming statutes do not address the particulars of what happens when a debtor declares bankruptcy under the federal bankruptcy code while a non-judicial foreclosure is pending. However, the U.S. Bankruptcy Court for the District of Wyoming confirmed, in dicta, that the filing of the debtor’s bankruptcy petition automatically stayed a pending foreclosure sale. *In re Duran*, 271 B.R. 888, 889; 2001 Bankr. LEXIS 1806; 48 Collier Bankr. Cas. 2d (MB) 219 (2001). The *Duran* court further confirmed that a secured creditor is entitled to relief from the automatic stay unless the debtor or trustee can provide adequate protection for the creditor’s interest in the security. *Id* at 889-90. Thus, before any foreclosure sale may occur, a court order lifting the stay and authorizing a foreclosure sale is required.

Unfortunately, the *Duran* court did not address, and no Wyoming court has addressed, whether the relief from stay requires the foreclosing creditor to start the foreclosure sale process over, or whether the creditor can simply pick up where it left off. Because the notice and sale periods are relatively short in Wyoming, it is the better practice to require the creditor to start over, to ensure no questions arise as to adequacy of notice.

### COMMENT

Any request to insure based upon a non-judicial deed of trust (or mortgage with a power of sale) foreclosure which was interrupted by the filing of a bankruptcy petition should be referred to a state or regional counsel or underwriter, unless the foreclosure was started anew.

## 7.7 PENDING CONTRACT FORFEITURE

The same concerns relating to mortgage or deed of trust foreclosures apply to an interrupted forfeiture of a real estate contract. Under normal circumstances a judicial action to forfeit can be resumed after the stay is lifted, as long as all parties get additional notice.

### COMMENT

To the extent reliance may be placed on a non-judicial process, any forfeiture interrupted by a bankruptcy filing must be re-commenced. This includes both *Washington* and *Oregon*, notwithstanding the fact that both of these states have a statutory non-judicial forfeiture procedure. It also applies to a bankruptcy filed during any statutory period following the forfeiture during which the vendee can challenge the forfeiture.

The bankruptcy trustee would have the right in any event to seek to set aside prior foreclosures or forfeitures within the 90 day or one year period prior to the bankruptcy.

It is possible that if the stay is lifted the vendor and vendee will agree to forego the forfeiture and the vendee will instead give the vendor a deed in lieu of forfeiture. This should achieve the same result as a completed forfeiture.

## COMMENT

However, caution should be exercised, particularly if the order lifting the stay is specific to the pursuit of forfeiture. Contrast this approach to the avoidance procedure discussed in “Avoided Liens (Including Contracts and Leases)” in §8.7 below on page 30 or a sale “free and clear of liens” discussed in “Real Estate Contracts and Leases” in §8.3.2 below on page 23.

## 8.0 SALE OR MORTGAGE DURING BANKRUPTCY

The title insurer will sometimes be able to confirm the authority of the debtor or trustee to sell or mortgage the property by checking the bankruptcy court records. If this is not practical, reliance might be placed on this information if it is provided by the debtor or the debtor’s attorney with underwriter approval. (This *should not be done* except in unusual circumstances; see EXHIBIT D for information about PACER, which allows ready access to all bankruptcy courts.)

Sales out of bankruptcy are the most common transactions for a title insurer. They can be divided into several broad categories: (1) **subject to liens**, (2) **free and clear of liens**, (3) **reorganization**, and (4) **exempt** or (5) **abandoned property**.

Transactions to be insured must be pursuant to a court order or be provided for in the plan. Orders authorizing a sale or mortgage are subject to appeal. See “Appeals” in §8.9 below on page 31.

A mortgage by the debtor in bankruptcy is less common. For the most part, the provisions in the following sections will apply also to a mortgage.

## COMMENT

However, the property will still be subject to the jurisdiction of the court, and so the pendency of the bankruptcy will continue to show as an exception in Schedule B – Part I (*not* in Schedule B – Part II as a subordinate matter – the bankruptcy itself is not a lien that has any relative priority to the insured mortgage) of any loan policy insuring the mortgage. Further, the order authorizing the mortgage may establish relative priority among other existing liens and the mortgage to be insured, and can be relied upon when determining whether to show the other liens in Part I or Part II of Schedule B.

Refer any request to ignore the bankruptcy or to show it as “subordinate” to the insured mortgage to a state or regional counsel or underwriter.

## 8.1 WHO MUST CONVEY

A conveyance would be executed by (1) the trustee, if there is one, for **property of the estate**, or (2) the debtor-in-possession for property of the estate in a Chapter 11 (if no trustee has been appointed) or (3) the debtor for **exempt property**.<sup>28</sup>

See “How the Stay is Lifted” in §7.3 above on page 12 for a description of **property of the estate** and “Exempt Property (Including Homestead)” in §8.5 below on page 26 and “Exempt Property” in §10.2 below on page 35 for a discussion of **exempt property**.

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<sup>28</sup> 11 U.S.C. §1142(b), BR 6004(f)(2), see also 11 U.S.C. §363(b)

## 8.2 SALES “SUBJECT TO” LIENS

This is the most common situation. For title insurance purposes, it is similar to any non-bankruptcy sale, except for the party who will execute the conveyance.

### 8.2.1 METHOD OF SALE “SUBJECT TO” LIENS

Sales may be private or by public auction.<sup>29</sup> Title insurers will normally be requested to insure private sales. Auction sales are less common.

#### COMMENT

Contact a state or regional counsel or underwriter if requested to insure a sale pursuant to an auction in bankruptcy.

### 8.2.2 NOTICE AND HEARING

The clerk of the court (or some other person as directed by the court) shall give the debtor, trustee, and all creditors twenty-one (21) days’ notice by mail of a proposed sale of property.<sup>30</sup>

The notice shall include the time and place of any public sale, the terms and conditions of any private sale, and the time fixed for filing objections. It is sufficient if it generally describes the property.<sup>31</sup>

Notice is not necessary in a Chapter 11 reorganization if the approved plan provides for the sale.

### 8.2.3 OBJECTIONS BY CREDITORS

Any objection to a proposed sale shall be filed and served not less than seven (7) days before the date set for the proposed sale “or within the time fixed by the court.”<sup>32</sup>

Neither a written court approval nor a hearing is required unless an objection is filed. If no objection is filed, the proposed sale can take place without a hearing or specific approval by the bankruptcy court.<sup>33</sup>

#### COMMENT

Nonetheless, a title insurer will usually require a court order approving the sale. Contact a state or regional counsel or underwriter if requested to insure without a court order.

### 8.2.4 AUTHORITY TO SIGN DEED

The trustee (if one is appointed) or **debtor-in-possession** (when the bankruptcy is a Chapter 11 reorganization and there is no trustee; see “Chapter 11 (Business Reorganization)” in §3.2 above on page 4 and “Conveyance of Debtor’s Property” in §4.2 above on page 7), as the case shall be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.<sup>34</sup> Thus, in a Chapter 7 or in a Chapter 11 (if a trustee has been appointed) or 13 plan, the trustee would sign a deed, in a Chapter 11 without a trustee, the debtor would sign a deed.

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<sup>29</sup> BR 6004(f)(1)

<sup>30</sup> BR 2002(a)

<sup>31</sup> BR 2002(c)(1)

<sup>32</sup> BR 6004(b)

<sup>33</sup> 11 U.S.C. §363(b)(1)

<sup>34</sup> 11 U.S.C. §1142(b), BR 6004(f)(2), see also 11 U.S.C. §363(b)

## 8.2.5 LIENS MUST BE SATISFIED

### COMMENT

**IMPORTANT:** This sale procedure does not eliminate nor affect any liens or interests encumbering real property other than the interest of the debtor. All liens and other interests that would otherwise be shown in a commitment, preliminary report, policy or guarantee must be dealt with, the same as in a non-bankruptcy sale. Releases or satisfactions must be obtained before they can be cleared or they will remain as liens on the title. Discharge of the debtor has no bearing on such liens (see “Effect of Discharge” in §11.0 below on page 37).

## 8.3 SALES “FREE AND CLEAR” OF LIENS

This is less common than a sale subject to liens. The bankruptcy court will provide that liens on the property are to be transferred to the sale proceeds.

The Code permits the trustee to sell property free and clear of liens by giving the same notice as required for a sale subject to liens. The Code does not impose any additional requirements or hearings even though the sale is to be free and clear of liens, nor does it require an order.

### COMMENT

However, a title insurer should not insure a sale free and clear of liens without (1) confirming that notice was sent to all creditors of the trustee’s intent to sell property free and clear of liens and (2) reviewing an order signed by the bankruptcy court specifically approving the sale (including the buyer’s name and the sale price) free and clear of liens.

The order should also specify which liens are to be affected. This is sometimes not done. Any ambiguities about the sufficiency of the order should be referred to a state or regional counsel or underwriter.

**IMPORTANT:** If a written satisfaction or release is not to be recorded, at least the bankruptcy order authorizing the sale should be recorded.

Generally, *non-dischargeable* debts will continue to show as exceptions in any commitment, preliminary report, policy or guarantee until paid, even if the order identifies them as included among those liens of which the property is to be sold “free and clear.”

### COMMENT

This especially includes real estate taxes and assessments, unless the taxing authority eliminates the taxes or assessments from any and all tax rolls and accounts. Refer any request to ignore outstanding taxes or assessments to a state or regional counsel or underwriter.

### 8.3.1 METHOD OF SALE “FREE AND CLEAR” OF LIENS

Sales free and clear of liens must be approved by the bankruptcy court. The court must find one of the following to approve a sale:

1. Non-bankruptcy state law would allow sale free and clear.
2. The secured creditors consent to the sale.
3. The sale price is greater than the lien amounts.

4. The lien is disputed by the trustee or the debtor.
5. The lienholder could be compelled to accept money to satisfy the lien (e.g. the lien is monetary, and not in the nature of a covenant or an easement, etc.).

Unless all secured creditors stipulate in writing to the sale, the order approving the sale is subject to a fourteen (14) day appeal period. (See “Appeals” in §8.9 below on page 31.)

The liens removed from the real property normally attach to the proceeds of the sale in the same priority as they attached to the property.

### 8.3.2 REAL ESTATE CONTRACTS AND LEASES

In many states, a real estate contract is considered in effect an equitable mortgage. Nonetheless, a real estate contract, for title insurance purposes, represents both a possessory interest in the land and either actual title or a right to title to the land, and is not just a lien securing a monetary obligation.

Similarly, a lease, for title insurance purposes, is not merely an encumbrance on the fee that secures a monetary obligation, but represents a possessory interest in the land, if not an actual interest in title to the land.

Thus, contracts and leases should not be ignored based solely on an order of sale “free and clear” but should be released by recorded document, notwithstanding the authority of the court to “reject” executory contracts or unexpired leases.<sup>35</sup>

#### COMMENT

Note that the court would need to approve such a document (as to a contract, a fulfillment deed from the vendor or deed in lieu of forfeiture, and as to a lease, a termination signed by both lessor and lessee) to be entered into by the debtor.

Any request to ignore a real estate contract or lease on the property, absent a deed or lease termination, is to be referred to a state or regional counsel or underwriter.

Similarly, for title insurance purposes, both parties to a real estate contract or a lease must approve in writing an assignment of the contract or lease.

See also “Avoided Liens (Including Contracts and Leases)” in §8.7 below on page 30 with respect to an attempt to avoid the “lien” of a real estate contract or lease, and also “Pending Contract Forfeiture” in §7.7 above on page 19.

### 8.3.3 NON-DISCHARGEABLE DEBTS

Non-dischargeable debts, such as federal tax liens, are normally paid and released of record (i.e., the “free and clear” does not apply to them). However, most such liens usually can be deleted from a policy if there are reliable assurances from the closer or the bankruptcy trustee that they will be *paid in full* from the proceeds.

#### COMMENT

**IMPORTANT:** an exception for ad valorem real estate taxes or assessments *is not to be deleted based on an order of sale* “free and clear” *even if the order includes such taxes or assessments*. Full payment of such taxes and assessments must be confirmed by the

<sup>35</sup> 11 U.S.C. §365 and BR 6006

taxing agency before deleting them from a policy, as with any non-bankruptcy transaction, unless and until the taxing authority eliminates the taxes or assessments from any and all tax rolls and accounts. Refer any request to ignore outstanding taxes or assessments to a state or regional counsel or underwriter.

## 8.4 SALES PURSUANT TO PLANS (CHAPTERS 11, 12 AND 13)

Any plan of reorganization should specifically authorize the sale or mortgage to be insured. If not, the plan should be amended (requiring additional notice to creditors) or an order should be entered which authorizes the transaction. Such an order would be subject to the appeal period (see “Appeals” in §8.9 below on page 31). Orders modifying the plan are authorized and the title insurer should require one.<sup>36</sup>

### 8.4.1 AUTHORITY TO SELL IN A PLAN

The authority to sell (or mortgage) property in a Chapter 11, Chapter 12, or Chapter 13 proceeding derives from the plan. The plan is proposed by the debtor (but may also be proposed by creditors) and confirmed by the court. The plan should provide for the disposition of the property. The property may be (1) retained by the debtor, (2) encumbered by the debtor, (3) sold subject to liens, (4) sold free of liens, or (5) distributed to creditors.<sup>37</sup>

Confirmation of the plan vests title to property in the debtor “free and clear of any claims or interests of any creditor provided for by the plan” unless otherwise provided in the plan.<sup>38</sup>

#### COMMENT

Nonetheless, this does not mean that the debtor may deal with the property in any way the debtor pleases. For title insurance purposes, the debtor may only sell or encumber property if the specific sale or encumbrance is described in the plan.

As discussed in “Notice to Creditors” in §8.4.2 below on page 25, it must be verified that all creditors received notice of the hearings on confirmation of the plan. If the plan does not describe the specific terms of the transaction that the title insurer is being asked to insure (including the parties and the amounts), a separate court order modifying the plan is authorized<sup>39</sup> and the title insurer should require such an order.

#### COMMENT

As with the original plan, it must be verified that all creditors received notice of the proposed amended plan by mail not less than twenty-one (21) days before the date the court order to accept or reject the modification of the plan was entered or is to be entered.<sup>40</sup>

Once a plan is confirmed, it is self-executing. No further order by the bankruptcy court is necessary to carry out the terms of the plan.

The plan should be carefully reviewed to confirm that the action of the debtor is in fact in conformance with the plan. Ambiguities in the plan require that the plan be amended to clarify the debtor’s authority. If the plan does not appear to contemplate the transaction to be insured, an

<sup>36</sup> 11 U.S.C. §1329

<sup>37</sup> 11 U.S.C. §1123 and 11 U.S.C. §1322(b)

<sup>38</sup> 11 U.S.C. §1327

<sup>39</sup> 11 U.S.C. §1329

<sup>40</sup> BR 2002(a)

order of the court should be required for title insurance purposes, or the plan must be amended to authorize the transaction. The order or the amended plan is subject to twenty-one (21) notice period<sup>41</sup> and subject to appeal (see “Appeals” in §8.9 below on page 31).

#### **EXAMPLE**

A Chapter 11 plan will usually permit the debtor to continue to operate a business. The debtor (a real estate developer, for example) may then wish to sell or encumber property to continue such operations in accordance with the plan.

However, unless the particular sale or mortgage is specifically permitted by the plan (identifying the buyer/lender and amount), the title insurer cannot determine whether it would be construed as in the **ordinary course of business** (see also “Chapter 11 (Business Reorganization)” in §3.2 above on page 4), and generally will require a bankruptcy court order or an amended plan approved by the bankruptcy court.

Any question about whether a pending transaction to be insured is “in the ordinary course of business” should be referred to a state or regional counsel or underwriter.

In the above example, for instance, the title insurer may make an exception if it is satisfied that the debtor is also a developer and the sale is in the “ordinary course of business” (e.g., a sale of lots in its inventory, for example, and not a sale of a personal residence). Refer such situations to a state or regional counsel or underwriter.

### **8.4.2 NOTICE TO CREDITORS**

All creditors (and the trustee in a Chapter 11 reorganization) must receive copies of:

1. the plan, or a court-approved summary of the plan,
2. a disclosure statement approved by the court,
3. notice of the time within which acceptances and rejections of the plan may be filed,
4. notice of any date fixed for the hearing on confirmation or time fixed for filing objections, and
5. such other information as the court may direct.<sup>42</sup>

All creditors shall be given not less than twenty-eight (28) days’ notice by mail of the time fixed for filing objections to and the hearing to consider confirmation of the plan.<sup>43</sup>

### **8.4.3 ACCEPTANCE OR REJECTION OF PLAN**

All creditors are entitled to vote whether or not to accept or reject the plan.<sup>44</sup> Unanimous acceptance, however, is not a prerequisite to confirmation of that plan by the court.<sup>45</sup>

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<sup>41</sup> BR 2002(a)

<sup>42</sup> BR 3017(d)

<sup>43</sup> BR 2002(b)

<sup>44</sup> 11 U.S.C. §1126

<sup>45</sup> 11 U.S.C. §1129(a) and 11 U.S.C. §1325

#### 8.4.4 CONFIRMATION OF PLAN

The Code contains a number of requirements that must be met before a plan can be confirmed. A title insurer usually will assume that the requirements have been met if the court has confirmed the plan, except that it must be verified that all notice requirements have been met.

#### 8.4.5 EFFECT OF CONFIRMATION

The plan should specifically deal with the debtor's property. The plan will be reviewed in detail by us, and generally will be relied upon to support the vesting of title, disposition of liens, and sale of the property (see "Authority to Sell in a Plan" in §8.4.1 above on page 24).

##### COMMENT

**Confirmation** of a plan still requires (1) an exception to the pendency of the bankruptcy case (see "Conveyance of Debtor's Property" in §4.2 above on page 7), and (2) confirmation that the proposed transaction is permitted by the plan.

#### 8.5 EXEMPT PROPERTY (INCLUDING HOMESTEAD)

Individual debtors (*not* businesses or farms) may *exempt* certain property (for example, **homestead** property) from the bankruptcy estate, and if the exemption is granted may deal with that property as though there were no bankruptcy.

##### COMMENT

If such property is the subject of a transaction to be insured during the pendency of the bankruptcy, it must be verified that creditors have not objected to the exemption. Review the bankruptcy file (including the schedules filed with the petition) and, if there is one, the plan.

All property not **exempt** is assumed to be **property of the estate**. See "How the Stay is Lifted" in §7.3 above on page 12.

##### 8.5.1 WHEN THE EXEMPTION IS CLAIMED

The debtor must list any property claimed as exempt on the schedule of assets filed with the petition. It must be filed with the petition or within fourteen (14) days for a voluntary petition or within 14 days of the entry for the order for relief for an involuntary petition.<sup>46</sup> If not done timely, a dependent has another 30 days to file the schedule.<sup>47</sup> After the conclusion of first meeting of creditors, they have 30 days within which to file an objection to a claimed exemption (unless additional time is granted by the court).<sup>48</sup>

##### COMMENT

Note that the title insurer should confirm the creditor's meeting has in fact concluded. That date may not have been the same day it first met.

If qualified property is not originally scheduled or claimed exempt, an amended schedule can be filed, but the title insurer will need to confirm notice has been given to all creditors.

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<sup>46</sup> BR 1007(c)

<sup>47</sup> BR 4003(a) [and see 11 U.S.C. §522(a)]

<sup>48</sup> BR 4003(b)



## 8.5.2 CHOICE OF EXEMPTIONS

The debtor may choose either the state homestead exemption or the federal exemption for real property used by the debtor as a residence, whichever exemption is more generous. There is a cap of \$125,000, however.<sup>49</sup>

The federal exemption is for “the debtor’s aggregate interest, not to exceed \$15,000 in value, in real property...that the debtor or a dependent of the debtor uses as a residence...”.<sup>50</sup>

Most state exemptions are higher than the federal exemption and thus, in those cases, a debtor will select it, subject to the upper limit of \$125,000. Therefore, in some states (such as Arizona, California, Montana and Nevada) this federal cap would control in a bankruptcy situation. Following is a list of *maximum* homestead exemption amounts for several Western states.

### COMMENT

In some cases the typical amount available to an owner is lower than these amounts – based, for example, on marital status, physical disability, etc. – but where the state has more than one exemption amount, only the higher amount is shown in this chart. Also, note that some states require the filing of a declaration of homestead, but in other states it is automatic.

NOTE: These amounts should be checked for statutory changes after the current date of this material.

CHART SHOWING STATE HOMESTEAD EXEMPTIONS			
State	Amount	State	Amount
Alaska	79,000	Montana	250,000*
Arizona	150,000*	Nevada	550,000*
California	175,000*	Oregon	50,000
Colorado	90,000	Utah	30,000
Hawaii	30,000	Washington	125,000
Idaho	100,000	Wyoming	20,000

\* As noted above, a debtor in bankruptcy could not use this state exemption, but would be limited to the maximum exemption of \$125,000.

NOTE: Even if a homestead exemption is granted and the property is no longer subject to the bankruptcy filing, that does not affect the lien of judgments on the land. (See “Liens not Extinguished” in 8.6.4 below on page 12.) Nonetheless, in some situations a judgment lien might be ignored. Whether or not land can be insured without exception for judgments would be based on underwriting guidelines unrelated to the bankruptcy itself. In general, if the debtor appears to be receiving value substantially in excess of the state (not federal) homestead exemption, contact a state or regional counsel or underwriter.

<sup>49</sup> 11 U.S.C. 522(p)(1) & (q)(1)

<sup>50</sup> 11 U.S.C. §522(d)(1)

### 8.5.3 OBJECTION TO CLAIM OF EXEMPTIONS

The trustee or any creditor must file an objection (if one is to be filed) to the list of property claimed exempt within 30 days after the conclusion of the meeting of creditors unless, within such period, further time is granted by the court.<sup>51</sup> The title insurer will want to determine if such additional time is requested and/or granted.

### 8.5.4 HEARING

If there is an objection, the objecting party has the burden of proving that the exemption is not properly claimed at a hearing scheduled for that purpose.<sup>52</sup>

### 8.5.5 FAILURE TO OBJECT TO EXEMPTION

Unless a creditor or the trustee objects then the exemptions as claimed by the debtor stand. There is no court order entered.

### 8.5.6 LIENS NOT EXTINGUISHED

Just as with a sale of non-exempt property, the exemption procedure does not affect or remove any liens which encumber the property, including mortgages, deeds of trust, judgment liens, and any and all other liens. **The exempt property remains subject to the liens unless and until released of record by the creditors.**

After the exemption is allowed, the debtor may then deal with **exempt property** as though the bankruptcy did not exist.

#### COMMENT

**IMPORTANT:** The title insurer may be willing to insure a sale free of the lien of judgments that do not exceed the homestead exception, but this would be based on the state homestead law and not due to the bankruptcy exemption or a discharge of the debtor. Refer to state underwriting guidelines or contact a state or regional counsel or underwriter about this procedure.

If the debtor is getting proceeds in excess of the homestead exemption then the closer should check with the bankruptcy trustee. In case of doubt, obtain assurances that the bankruptcy trustee is aware of the amount of proceeds going to the debtor.

### 8.6 ABANDONED PROPERTY (NO ASSET OR NO DISTRIBUTION)

The bankruptcy court no longer exercises any jurisdiction over the abandoned property. As with exempt property, the debtor may deal with the property as though there were no bankruptcy. A title insurer will typically see this in a closed bankruptcy with a “Report of No Distribution” prepared by the trustee and such cases are often referred to as “no asset” cases.

#### COMMENT

This does not apply to foreclosures, however. Even if the property is abandoned to the debtor, a stay is still in effect with respect to any action to “collect property of the debtor until the case is closed or dismissed.”<sup>53</sup>

<sup>51</sup> BR 4003(b)

<sup>52</sup> BR 4003(c)

See also “Pending Non-Judicial Foreclosure” in §7.6 above on page 13. If asked to insure through a foreclosure after the property was abandoned but the bankruptcy is still pending, an order lifting the stay should still be obtained.

Other transactions, however (for example, a proposed sale of the land by the debtor), would be permitted. Unless ordered otherwise by the court, any property scheduled and not otherwise administered *at the closing of the bankruptcy* case is considered abandoned to the debtor.<sup>54</sup>

#### **COMMENT**

If, after a bankruptcy is closed, property still owned by the former debtor is the subject of a transaction, it should be confirmed that the property was scheduled in the asset schedule filed with the original petition. If so, and there was no action taken with respect to it, the debtor is free to convey or encumber it.

If, however, the property *was not* scheduled, contact a state or regional counsel or underwriter about whether to assume the bankruptcy should be reopened. This can be done before ordering a review of a closed bankruptcy file, however, if access to the closed file is difficult. A decision will be made on a case-by-case basis as to the risk of whether or not the file needs to be checked or bankruptcy reopened to deal with that asset. Factors will include the passage of time since the filing, the type of filing and the nature of the asset.

### **8.6.1 WHO MAY REQUEST ABANDONMENT**

The trustee, debtor in possession, or a creditor may seek abandonment of any property by the bankruptcy court.<sup>55</sup>

### **8.6.2 GROUNDS FOR ABANDONMENT**

The grounds for abandonment are that the property is either burdensome to the estate or is of inconsequential value.<sup>56</sup> A common reason for abandonment is that the liens exceed or equal the value of the property and there is no equity to protect.

### **8.6.3 HOW ABANDONMENT IS ACCOMPLISHED**

The trustee or debtor in possession must give notice of a proposed abandonment to all creditors, who then have fourteen (14) days to object to that abandonment. A hearing would be scheduled if an objection is filed.<sup>57</sup>

A creditor may file a motion to require abandonment of property.<sup>58</sup> Refer also to “How the Stay is Lifted” in §7.3 above on page 12.

### **8.6.4 LIENS NOT EXTINGUISHED**

Abandonment also does not affect or remove any liens that encumber the abandoned property.

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<sup>53</sup> 11 U.S.C. §362(a)(5)

<sup>54</sup> 11 U.S.C. §554(c)

<sup>55</sup> 11 U.S.C. §554

<sup>56</sup> 11 U.S.C. §554(a)

<sup>57</sup> BR 6007(a)

<sup>58</sup> BR 6007(b)

## COMMENT

**IMPORTANT:** The property remains subject to all liens which had encumbered it going into the bankruptcy. If not released by the creditors, they remain as liens on the property during the pendency of the bankruptcy and continue as such after it is closed. These liens may be enforced (executed on or foreclosed) against the land after the abandonment has taken place. See “How Abandonment is Accomplished” in §8.6.3 above on page 29.

## 8.7 AVOIDED LIENS (INCLUDING CONTRACTS AND LEASES)

The bankruptcy court may enter an order “avoiding” liens as the result of what is commonly known as the trustee’s “strong arm” powers, or upon a showing that judicially imposed liens (i.e., judgments) impair the homestead exemption.<sup>59</sup> Note that all of these types of liens on the homestead property can be “stripped” in this manner.

This option available to the debtor is not commonly utilized, however. Note also that the court, at the request of a creditor, can appoint a trustee if the debtor refuses to pursue a course of action required by 11 U.S.C. §§544, 545, 547, 548, 549(a), or 550.<sup>60</sup>

## COMMENT

Following such an order, such liens are not shown as exceptions in title evidences. Note that this is an exception to the general Bankruptcy Rule discussed in “Liens not Affected by Discharge” in §11.2 below on page 38.

Note that it may be possible to reopen a closed bankruptcy to take advantage of this option. However, one case suggests that if not taken when the bankruptcy was open, the debtor has lost that relief.<sup>61</sup>

## COMMENT

**CAUTION:** Occasionally a debtor will file bankruptcy, obtain an order avoiding liens, and then close the bankruptcy before completing a plan (usually a Chapter 13 plan). Therefore, *do not* rely on an avoidance order if the bankruptcy is closed without completion of a plan. Contact a state or regional counsel or underwriter if requested to ignore avoided liens under such circumstances.

Cite: “Unless the court, for cause, orders otherwise, a dismissal of a case other than section 724 of this title...*reinstates*...any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title...and...any lien voided under section 506(d) of this title...[and]...*vacates* any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title...and...*revests* the [property of the estate in the entity in which the property was vested immediately before the commencement of the case...]”<sup>62</sup> [*emphasis added*].

A real estate contract or a lease can present a special problem. If for some reason a real estate contract, where the vendee (purchaser) is the debtor in bankruptcy, is purportedly “avoided” (based on authority to rejected executory contracts or unexpired leases<sup>63</sup>), for title insurance purposes the contract or lease should continue to be shown. First, notwithstanding that in many

<sup>59</sup> 11 U.S.C. §§544, 545, 547 and 548, subject to certain limitations (11 U.S.C. §546)

<sup>60</sup> 11 U.S.C. §926(a)

<sup>61</sup> *Bankruptcy of Cortez*, U.S.B.A.P. 9th, 96 WJ W.A.R. 63 (1995)

<sup>62</sup> 11 U.S.C. §349(b)

<sup>63</sup> 11 U.S.C. §365 & BR 6006

jurisdictions such a contract is considered an equitable mortgage, title still vests in the vendor (seller) until such time as a fulfillment deed is recorded. Relieving the debtor from the obligation to pay the remaining purchase price will not, for title insurance purposes, eliminate the contract itself as an encumbrance on the vendors “fee” title, nor vest title in the property in the debtor/purchaser free of any interest of the vendor.

#### COMMENT

Contact a state or regional counsel or underwriter if requested to ignore a contract, or the interest of either the vendor or vendee in any commitment, preliminary report, policy or guarantee, based on purported avoidance. A deed (in lieu, from the vendee to the vendor, or from the vendor to the vendee in fulfillment of the contract) will be required to establish the interest of either party free and clear of the interest of the other party.

Similarly, for title insurance purposes, both parties to a real estate contract or a lease must approve in writing an assignment of the contract or lease.

See also “Real Estate Contracts and Leases” in §8.3.2 above on page 23 with respect to an attempt to sell the interest of the debtor – whether as vendor or vendee – of a real estate contract, and also “Pending Contract Forfeiture” in §7.7 above on page 19.

## 8.8 MORTGAGES

It is not common that a *mortgage* by the debtor “free and clear of liens” would be authorized by the court. The court may, however, authorize a mortgage and establish its priority relative to existing liens. The title insurer will usually require confirming subordination agreements among secured creditors before showing existing liens in Schedule B – Part II as subordinate matters.

#### COMMENT

**IMPORTANT:** The pending bankruptcy would continue to be shown as an exception in any loan policy insuring a mortgage given by a debtor in bankruptcy (see “Conveyance of Debtor’s Property” in §4.2 above on page 7) even though the mortgage is permitted. The property would still be subject to the jurisdiction of the court (particularly in reorganization with a continuing plan) and the lender will not be able to foreclose without dealing with the bankruptcy. The bankruptcy exception should be shown in Schedule B – Part I of the loan policy and not in Schedule B – Part II (subordinate matters) because the bankruptcy action itself is not a lien that has a relative priority to the insured mortgage.

Contact a state or regional counsel or underwriter if asked to ignore the pendency of the bankruptcy or to show the exception in Schedule B – Part II.

## 8.9 APPEALS

Every order of the bankruptcy court authorizing a sale or mortgage is subject to appeal. The title insurer *must* wait until the appeal period has passed before clearing the bankruptcy exception when relying on that court order. (The exception is for a stipulated order, where all creditors have approved.)

The appeal is taken by filing a **Notice of Appeal** with the court clerk within fourteen (14) days of the date of *entry* of the judgment, order or decree that is being appealed.<sup>64</sup> **IMPORTANT:** Other parties have fourteen (14) days from that first filing to also file an appeal. Title insurers need to

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<sup>64</sup> BR 8002

confirm that if an appeal was filed within the fourteen (14) day period, other appeals were not also filed, but examining the court file should disclose all appeals.

Note that an *announcement* of a judgment or order by the judge is *not* the same as *entry* of the judgment or order. And, entry of the judgment requires the *expiration* of the 14 day period.

#### COMMENT

Start counting the 14 day period on the day after the date of entry, and include weekends and holidays (BR 8002). Thus, for example, if the order is entered on Wednesday, February 5, 2014, the last day an appeal could be filed would be Wednesday, February 19. The title insurer must have evidence *after the end* of the 14<sup>th</sup> day (February 19) that no appeal has been filed. Thus, the earliest day a policy could be written would be Thursday, February 20.

If the 14<sup>th</sup> day falls on a weekend or holiday, go to the next regular business day. Thus, if the order is entered on Monday, January 6, 2014, the 14<sup>th</sup> day would be Sunday, January 19. The final day on which an appeal can be filed is Monday, January 20, and the earliest day a policy could be dated would be Tuesday, January 21.

Note that an order of sale is stayed for "...14 days after entry of the order, *unless the court orders otherwise*."<sup>65</sup>

Additionally, the title insurer might be asked to waive the 14 day appeal period, on the basis of 11 U.S.C. §363(m). However, this provides that a reversal of an order of sale upon appeal does not affect a **good faith purchaser**.<sup>66</sup> A title insurer generally would not rely upon that provision for title insurance purposes. For one thing, that provision may not be applicable if the order of sale was made over the objection of some interested party.<sup>67</sup>

#### COMMENT

Contact a state or regional counsel or underwriter about such a request, or if the court shortens the stay period to less than 14 days, because it reduces the time available for objections. Before contacting the underwriter, the bankruptcy court file must first be reviewed to look specifically for objections to the sale. Also, the docket must be reviewed to see if any *adversary action* was filed. If so, the court file for that adversary proceeding must also be reviewed to determine if the action has any effect on the property to be insured.

In any event, a policy could not be issued until it is confirmed that no appeal has been filed.

## 8.10 TITLE INSURANCE OF SALE OR MORTGAGE

The title insurer will need to review at least the following:

1. the bankruptcy court order authorizing the proposed transaction, especially a Notice and Order to Sell Free and Clear,

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<sup>65</sup> BR 6004(h)

<sup>66</sup> "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

<sup>67</sup> See *In Re Halladay Enterprises, Inc.*, 85 BR 83 (Bankr. S.D. Texas 1980)

2. the plan (if a Chapter 11, 12 or 13),
3. the bankruptcy file to determine if any creditors object (see EXHIBIT A for an abstract designed to organize this process), and
4. a current commitment, preliminary report, policy or guarantee to confirm that all secured creditors shown therein were given notice (see EXHIBIT B for a checklist to help the examiner).

The existence of a confirmed plan does not mean the property can be sold or encumbered without checking the plan. See “Authority to Sell in a Plan” in §8.4.1 above on page 24. The plan must provide for the transaction and the trustee (if there is one) may give direction as to disposition of proceeds and preparation of documents.

Any proposed sale free and clear of liens must be carefully reviewed, as it would be an impairment of a creditor’s normal rights.

## **8.11 TRANSFER (EXCISE) TAX**

Some states provide for a transfer (or excise) tax on real estate conveyances or transfers.

### **8.11.1 EXCISE TAX – STATES OTHER THAN WASHINGTON**

As of this writing there are no transfer taxes applicable in Arizona, Idaho, Montana, Utah or Wyoming.

Property located in some cities and boroughs in Alaska, in some cities and counties in California, in Colorado, in Hawaii, in Nevada and in Washington County, Oregon may be subject to transfer tax when selling under any bankruptcy chapter. (NOTE: This information should be checked for changes after the current date of this material.)

#### **COMMENT**

Exception for the transfer tax should be shown as in any non-bankruptcy transaction until evidence of payment of the tax, or state or local acceptance of exemption from payment of the tax, is provided.

Contact a state or regional counsel or underwriter if requested to insure a sale without payment or proof of exemption for payment of the tax.

### **8.11.2 EXCISE TAX – WASHINGTON STATE**

In Washington State, the real estate excise tax does not apply to conveyances made under a Chapter 11 plan or Chapter 12 plan, with the Washington Administrative Code (WAC) providing that such conveyances are exempt under federal law.<sup>68</sup> A copy of the order of confirmation or an extract from the confirmed bankruptcy plan, showing (1) the date the bankruptcy plan was confirmed, (2) the court case cause number, and (3) the bankruptcy chapter number must be attached to the real estate excise affidavit that claims the exemption under this WAC section.

The WAC is silent as to conveyances made under either Chapter 7 or a Chapter 13 plan. An excise tax affidavit is always required in any event, and ultimately the Department of Revenue decides whether a conveyance will require payment of the tax.

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<sup>68</sup> WAC 458-61A-207; statutory authority under RCW 82.32.300, 82.45.150 and 82.01.060(2)

### COMMENT

The tax is payable even under a Chapter 11 or Chapter 12 sale if the plan is not confirmed at the time of the sale. A refund, with interest, can be requested once the plan is confirmed.

It would also appear that a Chapter 11 or Chapter 12 sale that is not pursuant to a confirmed plan is taxable. This is an unlikely scenario, since the plan would probably be amended to approve the sale rather than obtaining a special court order.

## 9.0 ACQUISITION OF PROPERTY DURING BANKRUPTCY

A debtor will sometimes acquire real property during the pendency of the bankruptcy. The title insurer may require court approval because of the question of the source of assets or credit used to acquire the property.

### COMMENT

Contact a state or regional counsel or underwriter in all such situations.

## 10.0 SALES BY DEBTOR AFTER BANKRUPTCY

After an estate is fully administered and the court has discharged the trustee, the court closes the case.<sup>69</sup> The title insurer will require this last step to be taken before insuring title to property remaining in the debtor. Until the bankruptcy is closed (and, if applicable, a plan completed), the sale or mortgage of the bankrupt's property must be pursuant to court order or specifically authorized by the plan, even if the debtor has been discharged.

### 10.1 PROPERTY ACQUIRED AFTER BANKRUPTCY CLOSED

Property acquired by the debtor after the bankruptcy is closed (and the plan completed, if there is a plan) is not subject to the jurisdiction of the bankruptcy court. The debtor is free to acquire such property and sell or mortgage it.

Such property is not subject to the liens of any judgments which had been (1) scheduled *and* (2) discharged in the bankruptcy. (See "Property or Debts not Scheduled" in §10.3 below on page 35.) Those liens would not be shown as exceptions in a commitment, preliminary report, policy or guarantee for property acquired later.

### COMMENT

Property acquired after the bankruptcy is closed (and completed, if there is a plan) would, however, be subject to the lien of any judgments that (1) were not scheduled in the bankruptcy (see "Property or Debts not Scheduled" in §10.3 below on page 35 ), or (2) were not discharged, or (3) are not dischargeable (see "Debts not Dischargeable" in §11.1 below on page 38), or (4) were entered after the closing of the bankruptcy (and completion, if there is a plan).

### CAUTION:

*Never* assume that a particular judgment has been discharged, simply because of a closed bankruptcy, especially if it is a large dollar amount. The title insurer should normally require evidence from the court file that the lien was scheduled and discharged. The

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<sup>69</sup> 11 U.S.C. §350(a)



discharge would be sufficient evidence of the dischargeability of a lien, assuming the lien was a dischargeable lien (see “Debts not Dischargeable” in §11.1 below on page 38).

## 10.2 EXEMPT PROPERTY

In many situations property claimed as exempt (usually the homestead) will not be sold by the debtor until after the bankruptcy is closed.

### COMMENT

**IMPORTANT:** Exempt property remains subject to all liens that encumbered it prior to bankruptcy, including judgment liens. Notwithstanding a discharge of personal liability for a judgment, the *lien* of the judgment remains against the property. Creditors may enforce (execute on or foreclose) such liens.

Again, if the title insurer is willing to insure a sale of homestead property free of the lien of a judgment, that decision will be based on state homestead law, and not based on the bankruptcy exemption or discharge.

Also it must be confirmed that the liens have not been “tolled” (i.e., the time period extended) by the pendency of the bankruptcy. See “Statutory Lien Periods Tolled” in §10.5 below on page 36.

## 10.3 PROPERTY OR DEBTS NOT SCHEDULED

All property owned by the debtor at the time the petition for bankruptcy is filed, or acquired during the pendency of the bankruptcy, and debts owed by the debtor are subject to the jurisdiction of the bankruptcy court.

Even though the bankruptcy has been closed, any unscheduled property, or property not disposed of by any of the procedures set forth above, remains subject to the jurisdiction of the bankruptcy court and title to such property should not be insured without further action by the bankruptcy court. This will usually involve reopening the bankruptcy.

### COMMENT

Contact a state or regional counsel or underwriter, however, to confirm the necessity of re-opening a bankruptcy for this purpose, particularly if the bankruptcy file is not readily accessible.

Similarly, debts not scheduled are also not affected by the bankruptcy, even if the debt is **dischargeable**. See “Effect of Discharge” in §11.0 below on page 37.

## 10.4 ADMINISTERING SALES OUT OF A COMPLETED PLAN

As noted in “Authority to Sell in a Plan” in §8.4.1 above on page 24, after approval by the court of a Chapter 11 or Chapter 13 plan, the bankruptcy may be “closed” before the plan is completed (fully administered).

### COMMENT

The exception for the pending bankruptcy case should not be deleted, nor should any exceptions for liens affecting the title be deleted, simply because the plan is in the process of being fulfilled. Contact a state or regional counsel or underwriter if requested to do so.

The title insurer might consider taking exception to the terms and provisions of the plan, including a full reference to the court case, in lieu of an exception for the pending

bankruptcy case, but this would also require approval from a state or regional counsel or underwriter.

The debtor or creditors can reopen the bankruptcy for various reasons.

If the title insurer is requested to insure based on the assertion that the plan has been fully administered and all payments have been completed, proof of such will be required from the debtor. At the minimum all creditors of record may need to be contacted to obtain confirmation (preferably by recorded release) that the liens have been paid in full.

## 10.5 STATUTORY LIEN PERIODS TOLLED

The filing of a bankruptcy petition may cause the time periods for federal tax liens, judgments or other state liens created by state or federal non-bankruptcy law to be **tolled**. When such a lien is established before the filing of bankruptcy, the automatic stay may prevent enforcement of the lien prior to termination of its statutorily prescribed life. When this happens the running of the statutory period is stopped when the bankruptcy petition is filed and will start running again when the property is no longer subject to the automatic stay.

Sometimes tolling doesn't take place, but the period in which a creditor is given to act on its lien is **extended** by bankruptcy law for a limited period of time after the termination of the automatic stay. State or federal law might cause these time periods to be extended.

### COMMENT

Contact a state or regional counsel or underwriter if requested to ignore a lien based on the assertion that time periods for enforcing the lien was not tolled by the filing of a bankruptcy.

### 10.5.1 JUDGMENTS AND OTHER STATE LIENS

Each state has varying time periods for the life of a judgment lien, and some have extended periods for child support or similar judgments. Bankruptcy law provides that if a judgment lien is created before and is in effect when the debtor files bankruptcy, the period allowed to the creditor for executing on the lien will not expire until the later of the following:

1. the original state statutorily prescribed life of the judgment; or
2. 30 days after termination of the automatic stay; or
3. if state law (where the property is located) provides for suspension of the running of the period of the judgment lien during a bankruptcy, then the time that the suspension is in effect is added to the life of the judgment lien.<sup>70</sup>

In other words, if under state law a judgment can otherwise be ignored after ten years (for example) or any other applicable statutory period, but the judgment debtor was in bankruptcy during part of that period, the time between the filing of a bankruptcy petition and the termination of the automatic stay is added to that 10 year life.

### TITLE PRACTICE

The tolling or extension of the life of a judgment lien may become an issue if requested to eliminate a judgment from Schedule B of the policy to be issued. If asked to eliminate a judgment before the statutory life of the judgment lien plus the period of time between

<sup>70</sup> 11 U.S.C. §108(c); *In Re: Morton*, 866 F.2d 561 (1 Cir. 1989); *Hazel v. Van Beek*, 954 P.2d 1301 (Wash 1998)

the filing of the bankruptcy petition and the termination of the stay ***do not ignore the judgment***. Although state law (where the property is located) may not contain a provision tolling the life of a judgment lien during bankruptcy, some courts have held that the filing of bankruptcy tolls the life of the judgment lien even if there is no such state law. That is now a minority position with the courts, but if the judgment is big enough it would be worth it to a creditor to make the argument in the appropriate case.

Contact a state or regional counsel or underwriter if unsure about how to respond to a request to eliminate a judgment lien which may have been tolled or extended.

## 10.5.2 FEDERAL TAX LIENS

After November 5, 1990, a federal tax lien expires ten years, plus 30 days, after the date of the assessment (unless refiled during the last year).<sup>71</sup> However, the life of the lien is tolled during the period in which the debtor's assets are in the control of the bankruptcy court. In addition, the lien remains tolled for an additional six month period following the release of the property from the control or custody of the bankruptcy court.<sup>72</sup> The lien then resumes for the balance of the ten year period (exclusive of the tolled period).

### EXAMPLE

A federal tax lien was recorded on March 5, 2003. It was not refiled between March 5, 2013, and April 5, 2013 (the 30 day period following the end of ten years), and might therefore normally be ignored after the latter date. However, the taxpayer filed bankruptcy on June 6, 2005, and the bankruptcy was closed on June 6, 2007. This lien would be effective until October 6, 2015 (10 years + 2 years + 6 months +30 days). Refiling would also be possible during the last year of this extended period.

## 10.6 JUDGMENTS ENTERED DURING BANKRUPTCY

A bankruptcy stays any action against the debtor, including the entry of a judgment or other lien. Nonetheless, such liens are filed, particularly when the claimant is unaware of the bankruptcy.

### COMMENT

However, for title insurance purposes, ***no judgment or other lien*** entered or filed during bankruptcy ***is to be ignored***. A release should be filed, or the lien avoided (see "Avoided Liens (Including Contracts and Leases)" in §8.7 above on page 30).

Contact a state or regional counsel or underwriter if asked to ignore such liens solely on the basis of an automatic stay and without an avoidance procedure in the bankruptcy case.

## 11.0 EFFECT OF DISCHARGE

A discharge frees the debtor from that personal liability for a debt (but **does not affect the lien of those debts on real property**). For title insurance purposes ***do not rely on a discharge as the basis for eliminating judgments or other liens*** as exceptions in title evidences, including commitments, preliminary reports, guarantees or policies.

<sup>71</sup> 26 U.S.C. §6502

<sup>72</sup> See §65.03(b) of the Internal Revenue Code

A discharge is often granted early in a bankruptcy case, but the disposition can take years. Again, remember that the property of the estate is still subject to the jurisdiction of the bankruptcy court, even where there is a Chapter 11, 12 or 13 plan, until the bankruptcy case is closed and the plan completed.

## 11.1 DEBTS NOT DISCHARGEABLE

Not all debts are dischargeable.<sup>73</sup> Examples are debts based on the following:

1. fraud or false representations,
2. federal income taxes or fines,
3. state taxes,
4. ad valorem real estate taxes and assessments,
5. penalties or forfeitures due governmental agencies
6. domestic support obligations (e.g., child or spousal support, including post-divorce),
7. debts obtained by fraud, false pretenses or misrepresentation,
8. certain homeowner's association assessments, and
9. certain educational loans.

Debts that are not scheduled (see also "Property or Debts not Scheduled" in §10.3 above on page 35) are also not discharged.

## 11.2 LIENS NOT AFFECTED BY DISCHARGE

A discharge in a Chapter 7 bankruptcy does not affect or extinguish any liens which encumbered the debtor's property when the bankruptcy was filed. This includes mortgages, deeds of trust, judgment liens, federal tax liens, taxes and assessments, etc. The discharge only affects personal liability for the debt.

### COMMENT

These liens must continue to be shown as exceptions in all title evidences on land retained by the debtor after bankruptcy. They can be enforced (executed on or foreclosed) (1) during bankruptcy if the stay is lifted or if the property is *abandoned* or *exempt*, or (2) after the bankruptcy is closed.

Such liens (*if* scheduled and discharged) can be ignored as to property acquired by the debtor after the bankruptcy has been closed.

Also make sure the lien periods have not been "tolled" during the pendency of the bankruptcy. See "Statutory Lien Periods Tolled" in §10.5 above on page 36.

Thus, for title insurance purposes unsecured debts (those not recorded in the real property records) are not a concern. Nor is it an issue as to whether liens shown as title exceptions have been discharged or even whether they are **dischargeable** because such liens are shown as exceptions until released of record.

The Bankruptcy Rule is slightly different for a Chapter 11 or 13 bankruptcy, which involve plans. After the plan is approved, such liens are effectively discharged, as in a Chapter 7.

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<sup>73</sup> 11 U.S.C. §523(a)

However, the plan generally provides for the payment of creditors. Therefore, the title insurer might be able to ignore such liens in title evidences, including commitments, preliminary reports, guarantees and policies on property retained by the debtor, unless the plan does not provide for that creditor.

**COMMENT**

The plan must be carefully reviewed to confirm that each creditor has been provided for. Contact a state or regional counsel or underwriter if requested to delete such exceptions.

Note that these guidelines requiring such liens to be shown do not apply to liens “avoided” by the bankruptcy court as discussed in “Avoided Liens (Including Contracts and Leases)” in §8.7 above on page 30. Liens that have been “avoided” can be ignored in later title evidences, including commitments, preliminary reports, guarantees and policies, on property owned at the time the bankruptcy was file and retained by the debtor after bankruptcy, subject to the above guidelines.

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**EXHIBIT A  
BANKRUPTCY OPINION**

**FOR TITLE EXAMINER:**

- Copy of Commitment attached showing vesting and exceptions:
1. Title Order No. \_\_\_\_\_ Date of Title Order: \_\_\_\_\_
  2. Return Opinion to: \_\_\_\_\_ Unit/Title Officer: \_\_\_\_\_
  3. REUS Description: \_\_\_\_\_  See attached commitment
  4. REUS Address: \_\_\_\_\_
  5. REUS Assessed Value: \_\_\_\_\_ Current Transaction Amount: \_\_\_\_\_
  6. Current Equity (Apparent value less encumbrances): \_\_\_\_\_
  7. Name of Your Party: \_\_\_\_\_
  8. Nature of Your Party's Interest:  Incoming  Fee  Vendee  Lessor  Lessee  
 Lien Holder  Other = Describe: \_\_\_\_\_  
Other party, if lessor/lessee or vendor/vendee: \_\_\_\_\_
  9. Date Your Party Acquired Interest in REUS: \_\_\_\_\_
  10.  Copy attached of Instrument, the validity of which depends on a court order
  11. Remarks: \_\_\_\_\_  See Reverse

**FOR COURT RECORDS EXAMINER:**

1. Cause No.: \_\_\_\_\_ Chapter: \_\_\_\_\_ Date Filed: \_\_\_\_\_
  2. DATES: Discharge: \_\_\_\_\_ Case Closed: \_\_\_\_\_ Case Dismissed: \_\_\_\_\_
  3. Debtor(s) \_\_\_\_\_
  4. Debtor's Attorney: \_\_\_\_\_ Phone: \_\_\_\_\_
  5. Name of Trustee: \_\_\_\_\_ Date Appointed: \_\_\_\_\_
  6. Name of Trustee's Attorney: \_\_\_\_\_ Phone: \_\_\_\_\_
  7. Real Estate Scheduled:  REUS: Value claimed in petition: \_\_\_\_\_  Other Property
  8.  REUS Exempt  State  Federal Date 1st Creditors meeting completed: \_\_\_\_\_
  9.  Order of Abandonment Or,  Report of No Assets Date filed: \_\_\_\_\_
  10. Orders:  Authorizing sale of REUS  Authorizing sale *free and clear*  Lifting Stay
  11.  11, 12 or 13 Plan filed=Date: \_\_\_\_\_  Amended Plan = Date: \_\_\_\_\_
- ATTACH COPY OF EACH affecting REUS:  Motion  Order  Plan
12. Order(s) Stipulated by debtor and *all* creditors:  Yes  No  
Identify Parties not stipulating: \_\_\_\_\_
  13.  Motion(s) for reconsideration of any order filed  None filed
  14.  Notice given to all creditors in Schedule B of Commitment  Not given (Explain Below)
  15. List (1) all *objections* or *appeals* to any order or plan, (2) by whom, and (3) date filed: \_\_\_\_\_  
\_\_\_\_\_
  16. If so, COPY ATTACHED.
  17.  Adversary action filed? Cause No.: \_\_\_\_\_  
Parties: \_\_\_\_\_
  18.  Other lawsuits affecting REUS or debtor?  
Parties: \_\_\_\_\_  
Court: \_\_\_\_\_ Cause No.: \_\_\_\_\_
  18. Remarks: \_\_\_\_\_  See Reverse

Opinion by: \_\_\_\_\_ Date of Opinion: \_\_\_\_\_

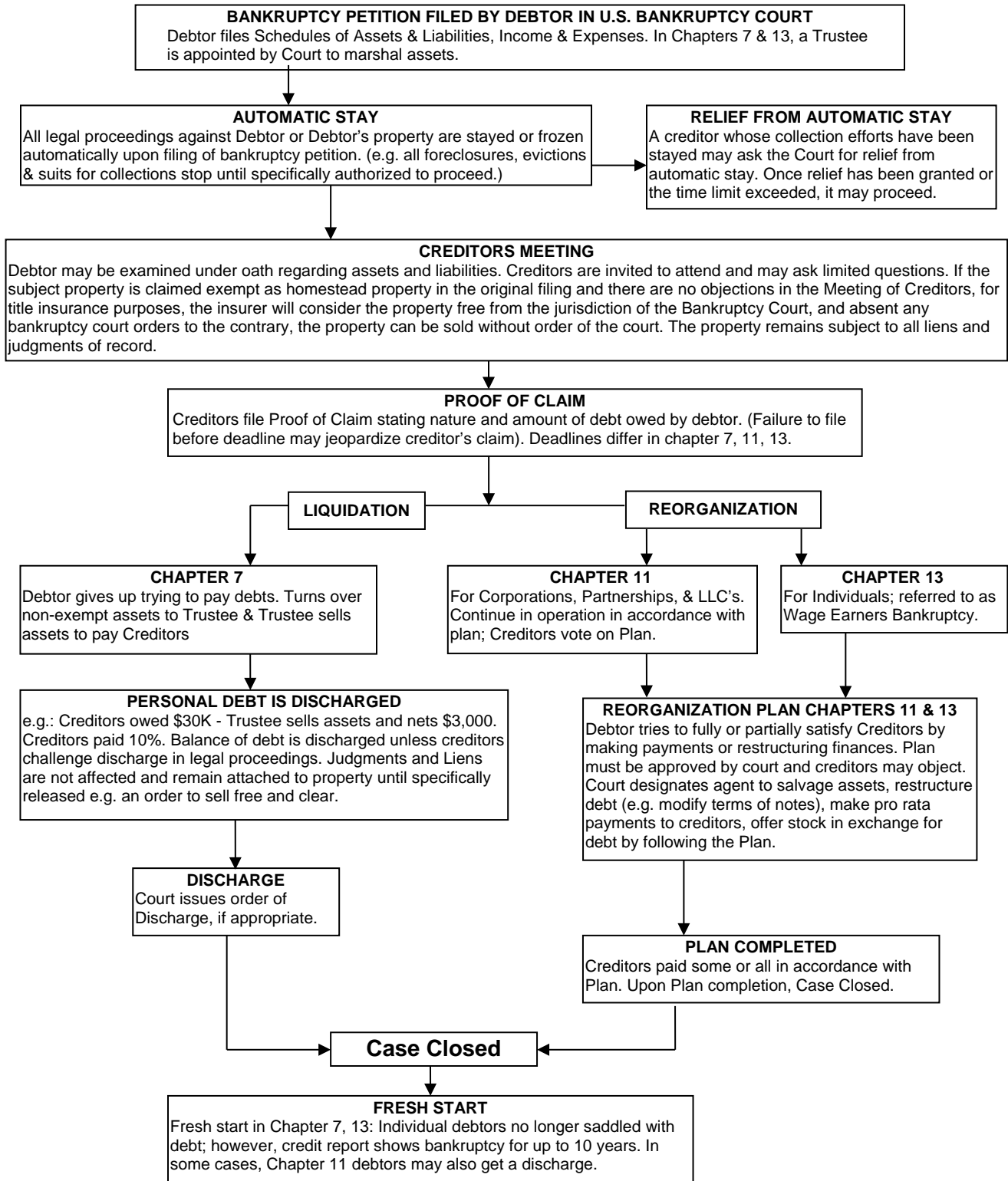
**EXHIBIT B**  
**BANKRUPTCY CHECKLIST**

NO.	ACTIVITY	YES	NO
<b>GENERAL (Show Dates)</b>			
1	Show paragraph in Schedule B	<input type="checkbox"/>	<input type="checkbox"/>
2	Bankruptcy abstract:      ordered <input type="checkbox"/> received <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2a	Date of bankruptcy abstract:	<input type="checkbox"/>	<input type="checkbox"/>
3	Property under search (REUS) listed	<input type="checkbox"/>	<input type="checkbox"/>
4	Trustee appointed	<input type="checkbox"/>	<input type="checkbox"/>
5	Adversary proceeding?	<input type="checkbox"/>	<input type="checkbox"/>
5a	Parties to proceeding	<input type="checkbox"/>	<input type="checkbox"/>
6	All creditors from title search listed in bankruptcy	<input type="checkbox"/>	<input type="checkbox"/>
6a	Objections? (List parties objecting)	<input type="checkbox"/>	<input type="checkbox"/>
7	Order lifting stay	<input type="checkbox"/>	<input type="checkbox"/>
7a	Appeal:      possible <input type="checkbox"/> filed <input type="checkbox"/> time to appeal past <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7b	If filed, appeal it is:      pending <input type="checkbox"/> dismissed <input type="checkbox"/> upheld <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8	REUS is:      exempt <input type="checkbox"/> abandoned <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9	Has debtor been discharged? (NOTE: Does <i>not</i> affect liens)	<input type="checkbox"/>	<input type="checkbox"/>
10	Bankruptcy dismissed?	<input type="checkbox"/>	<input type="checkbox"/>
11	Bankruptcy closed?	<input type="checkbox"/>	<input type="checkbox"/>
<b>PLANS (CHAPTERS 11, 12, 13) (Show Dates)</b>			
1	Court order confirming plan filed	<input type="checkbox"/>	<input type="checkbox"/>
2	Bankruptcy closed? (Plan may still be in effect!)	<input type="checkbox"/>	<input type="checkbox"/>
3	Plan completed?	<input type="checkbox"/>	<input type="checkbox"/>
3a	If so, proof all creditors paid	<input type="checkbox"/>	<input type="checkbox"/>
<b>SALE (Show Dates)</b>			
1	Sale authorized by:      court order <input type="checkbox"/> plan <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	Authorized transaction matches terms of transaction exactly	<input type="checkbox"/>	<input type="checkbox"/>
2a	If not authorized, is there an amended:      court order <input type="checkbox"/> Plan <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2b	Appeal:      possible <input type="checkbox"/> filed <input type="checkbox"/> time to appeal past <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2c	If appeal filed:      dismissed <input type="checkbox"/> upheld <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	If order/plan is for sale "free and clear" are <i>ALL</i> liens listed	<input type="checkbox"/>	<input type="checkbox"/>
3a	If not listed, there is an amended:      court order <input type="checkbox"/> plan <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3b	Appeal from amended order/plan:      possible <input type="checkbox"/> filed <input type="checkbox"/> time to appeal past <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3c	If appeal filed:      dismissed <input type="checkbox"/> upheld <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4	Liens released of record (unless "free and clear")	<input type="checkbox"/>	<input type="checkbox"/>
<b>MORTGAGE (Show Dates)</b>			
1	Mortgage authorized by:      court order <input type="checkbox"/> plan <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	Authorized transaction matches terms of transaction exactly	<input type="checkbox"/>	<input type="checkbox"/>
2a	If not authorized, there is an amended      court order <input type="checkbox"/> plan <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2b	Appeal:      possible <input type="checkbox"/> filed <input type="checkbox"/> time to appeal past <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2c	If appeal filed:      dismissed <input type="checkbox"/> upheld <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	Priority of other liens addressed in order/plan?	<input type="checkbox"/>	<input type="checkbox"/>



## EXHIBIT C

# Life Cycle of Bankruptcy – Chapters 7, 11, and 13



**General Notes:**

1. Creditors or Partners can file an involuntary petition asking the Court to place the Debtor in bankruptcy against his/her/its will.
2. Any sale or financing of real property is subject to the approval of the Bankruptcy Court.
3. Judgments and Liens remain attached to the property until specifically released by an order to sell the property free and clear of specific liens and judgments; or an order avoiding the specific lien or judgment, which could be limited to the amount of the homestead exemption and therefore still attach to the property for the amount, if any, in excess of the homestead exemption.
4. Warning! This chart is intended as a general overview of the process. For specific situations, contact a state underwriter.

## EXHIBIT D

### PACER

#### WHAT IS PACER?

Public Access to Court Electronic Records (PACER) is an electronic public access service website ([Pacer Website](#)) that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. PACER is a service of United States Judiciary. The PACER Service Center is run by the Administrative Office of the United States Courts.

Currently most courts are available on the Internet and links ([Courts Links](#)) to these courts are provided from this web site. Electronic access is available for most courts by registering ([Pacer Registration](#)) with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center.

Each court maintains its own databases with case information. Because PACER database systems are maintained within each court, each jurisdiction will have a different URL or modem number. Accessing and querying information from each service is comparable; however, the format and content of information provided may differ slightly. Phone links to courts ([Court Links](#)) are also provided.

#### WHY USE PACER?

The PACER System offers an inexpensive, fast, and comprehensive case information service to any individual with a personal computer (PC) and Internet access. The PACER system permits you to request information about a particular individual or case. The data is displayed directly on your PC screen within a few seconds. The system is simple enough that little user training or documentation is required.

#### U.S. PARTY/CASE INDEX

The [U.S. Party/Case Index](#) is a national index for U.S. district, bankruptcy, and appellate courts. A small subset of information from each case will be transferred to the [U.S. Party/Case Index](#) each night. The system serves as a locator index for PACER. You may conduct nationwide searches to determine whether or not a party is involved in federal litigation. For detailed information on cases found while searching the [U.S. Party/Case Index](#), you will need to visit the PACER site for the particular jurisdiction where the case is located.

#### AVAILABLE INFORMATION

The PACER System offers electronic access to case dockets to retrieve information such as:

- A listing of all parties and participants including judges, attorneys, and trustees
- A compilation of case related information such as cause of action, [nature of suit](#), and dollar demand
- A chronology of dates of case events entered in the case record
- A claims registry
- A listing of new cases each day
- Appellate court opinions
- Judgments or case status
- Types of documents filed for certain cases
- Many courts offer imaged copies of documents

#### AVAILABILITY

The PACER System is available days, nights, and weekends. You can verify all updates to active and recently closed cases without having to make repeated trips to the court to review paper records. If there have been no updates, this can be confirmed in seconds.

#### COST

The United States Congress has given the Judicial Conference of the United States, the judicial governing body of the U.S. Federal Courts, authority to impose user fees for electronic access to case information. Click on these links for a [history of the electronic public access fee](#) and a [current electronic public access fee schedule](#). All registered agencies or individuals will be charged a user fee. Access to web based PACER systems will generate a \$.10 per page charge as of February 2014 per [page](#) charge, capped at \$3.00 per document. In addition The per page charge applies to the number of pages that results from any search, including a search that yields no matches (one page for no matches.) The charge applies whether or not pages are printed, viewed, or downloaded. Users will NOT incur both per minute and per page charges for a PACER session. You will be billed on a quarterly basis for your transactions. There is no cost for registering, and transactions totaling less than \$15.00 in a quarter will result in the waiver of the fees for that quarter. You will be allowed to enter a client code of your choosing each time you login to PACER to help facilitate managing your costs.