

Bulletin

FLORIDA BULLETIN 05-05

TO: ALL AGENTS AND TITLE PLANT OPERATIONS
FROM: UNDERWRITING DEPARTMENT
DATE: NOVEMBER 29, 2005
RE: BANKRUPTCY CODE

The bigger, badder bankruptcy code...

It was traditionally referred to as the "10 Finger Code." Following the recent change, it is now called the "10 finger, 10 toe code." The good news? For those of us in the business of real estate closings, little has changes.

The majority of closings involving bankruptcy are of homestead real property. Unless the homestead exemption amount is limited under the new code, transactions involving bankruptcy will continue to be handled as before.

Attached for your information is a bulletin that highlights the significant areas of change.

Should you have any questions, please contact your Old Republic Underwriting Department.



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201-05-1031

BULLETIN

TO: Distribution

FROM: Chuck Hoyum

DATE: October 31, 2005

SUBJECT: Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005 (the Act)

The above Act (P.L. 109-8) was signed into law by President Bush on April 20, 2005, and applies to all bankruptcies filed on and after October 17, 2005, unless otherwise specifically provided. The Act contains over 20 provisions that apply to real estate, but basic real estate conveyancing in bankruptcy is unchanged by the provisions of the Act. The following is a summary of those provisions which bear most directly on the title insurance business.

HOMESTEAD EXEMPTION

The homestead exemption is limited to a maximum of \$125,000 for any property acquired during the 1215-day (approximately 3 years, 4 months) period immediately preceding the filing of the petition in bankruptcy, notwithstanding the exemption available under state law (unlimited in Florida and some other states). In the several states which have homestead exemptions in excess of \$125,000, this will make homesteads much more reachable by a trustee in bankruptcy and will significantly minimize the ability of debtors to invest otherwise nonexempt assets in the homestead. The date of acquisition of the property will need to be compared to the date the petition is filed in all instances.

There is no change with respect to the applicability of state law exemptions in excess of \$125,000, if applicable, as to properties acquired prior to the 1215-day look back period.

COMMON INTEREST COMMUNITY DUES ASSESMENT EXCEPTION TO DISCHARGE

Section 523(a)(16) has been amended to provide that if a debtor is a member of a condominium, cooperative, townhouse or other homeowner's association which assesses regular dues to its members, the obligation to pay such dues may not be discharged so long as the debtor or bankruptcy trustee has a legal, equitable or possessory interest in the unit or lot comprising a part of the property governed by the homeowners' association.

PERFECTION OF LIEN INTEREST

Section 547 has been amended in two particulars to extend the period in which a secured party can perfect its lien interest and avoid a claim of preference by a party in interest. Section 547 (e)(2) has been amended by extending the safe harbor for a secured party to perfect its lien from 10 days to 30 days after the lien is granted.

Similarly, Section 547 (c)(3)(b) has been amended to extend the period in which the holder of a purchase-money security interest may perfect its interest from 20 to 30 days after the debtor takes possession of the property.

These timeframes must be kept in mind when recording mortgages on which we are incurring title insurance obligations. The Company experienced a significant increase in claims in the last few years when mortgages were recorded outside of the 10 day and 20 day safe harbor periods previously provided for in Section 547, particularly on refinance transactions. These amended provisions should help us, but it is still important to take all steps possible to assure that mortgages are recorded in a timely manner so as to minimize preference claims under Section 547.

FRAUDULENT CONVEYANCE LOOK BACK PERIOD

Section 548 (a)(1) has been amended to extend the look back period for fraudulent conveyances under the Bankruptcy Code from one year to two years. This change will be effective as to any bankruptcy case filed on or after April 20, 2006. As under previous bankruptcy law, any longer look back provision under applicable state law still applies.

REVERSAL OF McCONVILLE RULE

Sections 549(c), governing the trustee's avoiding power of postpetition transfers, and the definition of transfer in Section 101(54) were both amended to prevent a future court from reaching the same conclusion reached by the Ninth Circuit Court of Appeals in Thompson v. Margen (In Re: McConville), 110 F. 3d 47 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997).

In *McConville* a lender made a loan to the debtor after the filing of the debtor's Chapter 11 petition in bankruptcy. The lender had no knowledge of the bankruptcy and no notice of the bankruptcy was filed in the applicable land records. The trustee brought a motion to avoid

the lien of the mortgage under Section 549 (a) as an unauthorized post-petition transfer. The lender argued it was protected under Section 549 (c) which stated “The trustee may not avoid a transfer in real property to a good faith purchaser without knowledge of the commencement of the case ...unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer...”

The Ninth Circuit held that the good faith purchaser exception in Section 549 (c) did not apply because “the creation of a lien does not transfer property for purposes of section 549”. Section 549 (c) has been amended to include transfers of *interests* in real property and not just transfers of real property. Section 101(54), the definition of *transfer* under the Code, has been amended to specifically include the creation of a lien.

The ALTA lobbied extensively for these two statutory changes which both lend certainty to lenders and protect the integrity of state recording statutes.