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Edward S. Adams

University of Minnesota Law School, adams006@umn.edu

James L. Baillie

Fredrikson & Byron, P.A., jbaillie@fredlaw.com

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Articles

A PRIVATIZATION SOLUTION TO THE LEGITIMACY OF PREPETITION WAIVERS OF THE AUTOMATIC STAY

Edward S. Adams* and James L. Baillie**

On April 13, 1988, the Club Tower Limited Partnership ("Debtor") entered into a loan agreement with the Teacher Retirement System of Texas ("TRST") to finance the purchase of a luxury apartment building.¹ C & S National Bank ("Bank"); which held the interim note used to finance construction of the building, transferred the financing note to TRST. As security for the financing note, the Bank also transferred the Debtor's Deed to Secure Debt, Security Agreement, and Financing Statement to TRST.² This gave TRST a first-priority lien against the Debtor's interest in the property and a security interest in all the Debtor's contracts, rents, and proceeds arising from the operation of the apartment building.

Beginning in 1990, the Debtor defaulted on its payments to TRST. After negotiating a workout, the parties entered into a forbearance agreement in February 1991, by which TRST agreed to refrain from foreclosing on the property if the Debtor could raise \$1,000,000 in new equity to cover interest payments of the loan and predicted operating deficits.³ As part of the forbearance agreement, the Debtor agreed that TRST would be entitled to immediate relief from the automatic stay in the event that the Debtor filed for bankruptcy. In exchange for this forbearance, the Debtor also agreed to deposit with an escrow agent a deed to the property conveying all of its interest in the property to TRST. The escrow agent was instructed to give the deed to TRST

* Associate Professor of Law and Director of the Center for Law and Business Studies, University of Minnesota Law School. J.D., University of Chicago Law School; B.A., Knox College.

** Partner and Co-Chair of Bankruptcy Group, Fredrikson & Byron, P.A., Minneapolis, Minnesota. J.D., University of Chicago Law School; A.B., University of Chicago. Excerpts of this Article are taken from Mikel R. Bistrow & James L. Baillie, *Waiver of Bankruptcy Protections in Pre-Bankruptcy Workout Agreements*, in BUSINESS WORKOUTS MANUAL (Donald L. Rome ed., 2d ed. 1995).

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1. *In re Club Tower L.P.*, 138 B.R. 307, 308 (Bankr. N.D. Ga. 1991).
2. *Id.*
3. *Id.*

in the event the Debtor could not raise the new capital by May 31, 1991. TRST subsequently extended the deadline one week.⁴

On June 6, 1991, the Debtor, whose only asset was the apartment building, filed a Chapter 11 bankruptcy petition.⁵ TRST asked the court to lift the automatic stay because the Debtor had specifically agreed to waive the protection of the stay by agreeing to transfer the deed to TRST in the event the Debtor could not raise the capital to service the debt—which it could not.⁶

The Debtor argued that the enforcement of the forbearance agreement would deprive it of one of the most important protections bankruptcy gives debtors—time to arrange a reorganization plan. TRST, on the other hand, argued the court should bind the Debtor to the agreement and the Debtor should not be able to take advantage of the bankruptcy protections to shelter an asset in contravention of their express agreement.⁷

Who prevailed and why? In this instance, the court held for TRST.⁸ The court noted that by lifting the stay, it was not depriving the Debtor of all bankruptcy protections but only the protection of the stay, and only with regard to this one creditor.⁹ The court further found that the Debtor did not waive its right to file a bankruptcy petition, but only waived the right to one aspect of bankruptcy, the automatic stay.¹⁰ Finally, the court concluded that the Debtor already received a benefit from the stay because the stay was in effect from the time of the filing until the time of the court's decision.¹¹

The factual scenario described above is not an uncommon one. When a corporate debtor defaults on an obligation to a lender, the two parties will often attempt to renegotiate the loan agreement to give the debtor a chance to cure the default. Lenders have come to see these "workout" agreements as an opportunity to obtain concessions from the debtor that would adversely affect the debtor's legal position in any subsequent bankruptcy filing by the debtor. Typically, the lender demands that the debtor agree to waive or modify protections it would gain by filing a petition for relief with the bankruptcy court.¹² Additionally, the lender will usually demand a stipulation of admissions

4. *Id.* at 309.

5. *Id.*

6. *Id.*

7. *Id.* at 310.

8. *Id.* at 312.

9. In reality, the apartment building was the only asset of the partnership and TRST was the only secured creditor. *Id.* Accordingly, while the debtor may be able to avail itself of the other protections offered through bankruptcy, this is of little solace to the single-asset debtor. See also *In re Hudson Manor Partners*, No. 91-81065HR, 1991 WL 472592 (Bankr. N.D. Ga. Dec. 31, 1991).

10. *Club Tower*, 138 B.R. at 311.

11. *Id.*

12. Such waivers include: a waiver of the right to file bankruptcy, a waiver of the right to discharge, a waiver of the automatic stay protection with respect to an asset or assets, and a waiver of the right to propose a bankruptcy reorganization under terms that differ from those specified in the workout agreement.

A typical acknowledgement and relief from stay waiver might provide as follows:

The parties hereby acknowledge and agree as follows:

a. Borrower is obligated to lender under the [loan documents];

b. The amount owing by Borrower to Lender under the note is currently

[\$--].

c. The loan evidenced by the loan documents is and has been in default since no later than [Date];

from the debtor which can, if necessary, be entered into the record in support of the waiver. Some have suggested that a lender's failure to obtain these concessions from a debtor constitutes attorney negligence.¹³ Because a creditor's ability to avoid the automatic stay can have serious financial consequences, many creditors have begun to condition loans on the debtor's consent to waive the automatic stay should the debtor file for bankruptcy—leaving it to the bankruptcy courts to determine the validity of such waivers.¹⁴

The most common waiver of bankruptcy rights, usually found in real estate loan workout agreements, is a waiver of the protection of the automatic stay.¹⁵ The automatic stay is one of the most important provisions of the Bankruptcy Code. Upon the filing of the bankruptcy petition, § 362(a) operates immediately to prevent the debtor's creditors from taking essentially any action against the debtor or the bankruptcy estate, subject to the exceptions in § 362(b). It applies to all entities and operates to stay:

- (1) the commencement or continuation of judicial, administrative, or other action against the debtor;
- (2) the enforcement of a prepetition judgment against the debtor;
- (3) any act to obtain possession of or control over any property of the estate;
- (4) the creation or perfection of a lien against any property of the estate;
- (5) any act to create or perfect a lien against any property of the debtor to the extent the lien secures a claim that arose prepetition;
- (6) any act to collect a prepetition debt;

d. Borrower's obligations under the loan documents are secured by [*Real Property*];

e. There is no equity in the [*Real Property*]; the approximate value of the [*Real Property*] is \$_____;

f. Borrower and Lender have agreed to defer exercise of Lender's remedies until [*Date*] solely to give Borrower an opportunity to sell [*Real Property*] and if a sale does not occur by [*Date*], Borrower will deed [*Real Property*] to Lender;

g. But for the forbearance and other concessions made by lender under this agreement, Borrower would have no ability to reorganize its affairs;

h. Any bankruptcy filing by Borrower would be for the sole purpose of delaying lender in the exercise of its remedies, and therefore would be in bad faith; and

i. Lender shall be entitled to relief from the automatic stay imposed by 11 U.S.C. § 362 on or against the exercise of any and all rights and remedies available to lender under this agreement or the loan documents upon the filing of a bankruptcy case by or against Borrower; Borrower shall not oppose any motion for relief from the automatic stay brought by Lender.

Bistrow & Bailie, *supra* note **, ¶ 21.10, § 21-13 (1995 Cumulative Supp.).

13. See Craig Auerbach, *Bankruptcy Issues: Emphasizing Drafting Considerations in Protecting Against Insolvency*, C950 ALI-ABA 303, 316-17 (citing Peter S. Partee, *The Enforceability of Prepetition Waivers of a Debtor's Rights Under the Automatic Stay*, NORTON BANKR. L. ADVISOR, Nov. 1992, at 5, 10) ("more courts are likely to adopt the view that prepetition waivers of the automatic stay are enforceable in bankruptcy, and lenders' counsel may expose themselves to allegations of negligence by not recommending the use of such waivers in original loan documents and in workout agreements").

14. Peter S. Partee, *The Enforceability of Prepetition Waivers of a Debtor's Rights Under the Automatic Stay*, NORTON BANKR. L. ADVISOR, Nov. 1992, at 5-6.

15. Scotta E. McFarland, *Waivers of Bankruptcy Rights in Workout Agreements*, 8 Dec. PROB. & PROP. 15 (1994).

- (7) the setoff of any debt owed to the estate that arose prepetition; and
 (8) the commencement or continuation of any proceeding before the U.S. Tax Court regarding the debtor.¹⁶

With very limited exceptions, the automatic stay prohibits the commencement or continuation of creditor actions against the debtor.¹⁷

The stay is "automatic" because it is triggered upon a debtor's filing of a bankruptcy petition regardless of whether a debtor's creditors are aware that the debtor has filed such a petition. Once the stay is triggered, it "continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay."¹⁸

The court may lift or otherwise alter the stay for cause, including the lack of adequate protection, or if the debtor does not have equity in the property in question and it is not necessary to an effective reorganization.¹⁹

The automatic stay's role in bankruptcy cannot be overstated.²⁰ Upon the filing of a bankruptcy petition, § 362(a) operates immediately to prevent the debtor's creditors from taking essentially any action against the debtor or the bankruptcy estate. As drafted, the provision is broad, and bankruptcy courts have not hesitated to expand its scope even further.²¹ However, the stay only affects prepetition claims and claims that could have been brought prepetition.²² Postpetition claims are only stayed to the extent that a holder of a claim attempts to enforce them against property of the estate.²³

Several fundamental policy rationales support enforcement of the automatic stay. First, the stay of creditor action provides a "breathing spell" for the debtor. It stops collection actions and harassment, thereby providing the debtor some relief and also the opportunity to work out a payment plan or reorganization.²⁴ Second, the stay prevents the disorderly liquidation or dismemberment of the estate. Without the stay, chaos could reign upon the filing of bankruptcy. Third, the stay protects creditors from a race of diligence to the courthouse. Absent the stay, some creditors could gain preference over others by being the first to execute their claims against the debtor's property.²⁵

16. See 11 U.S.C. § 362 (1994).

17. See *id.* § 362(b).

18. William Bassin, *Why Courts Should Refuse to Enforce Pre-Petition Agreements that Waive Bankruptcy's Automatic Stay Provision*, 28 IND. L. REV. 1, 3 (1994) (citing *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991), and *NLT Computer Servs. v. Capital Computer Sys.*, 755 F.2d 1253, 1258 (6th Cir. 1985)).

19. 11 U.S.C. § 362(d).

20. Section 362(a) is also one of the most litigated provisions in the Bankruptcy Code. ROBERT L. JORDAN & WILLIAM D. WARREN, *BANKRUPTCY* 286 (2d ed. 1989).

21. See, e.g., *In re Litchfield Co.*, 135 B.R. 797 (W.D.N.C. 1992) (staying actions against the debtor's partners in a limited partnership). See also *United States v. Richards*, 994 F.2d 763 (10th Cir. 1993); *United States v. Wilson*, 974 F.2d 514 (4th Cir. 1992); *In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991).

22. 11 U.S.C. § 362; Robin E. Phelan & Stacey Jernigan, *Solomon's Condensed: Current Developments Regarding the Section 362 Automatic Stay*, 650 PLI/Comm 7 (PLI Order No. A4-4408 (1993)).

23. 11 U.S.C. § 362(a).

24. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6296-97.

25. *Id.*

Despite the many obvious benefits, the automatic stay can also be detrimental to creditors. Unsecured creditors are prevented from obtaining judgments and executing against the debtor's property due to the stay. These creditors are left with unsecured claims which ultimately amount to very little in bankruptcy.²⁶ Undersecured creditors are prohibited from foreclosing on the debtor's collateral—thus they lose the time value of money for the period between the time of possible foreclosure and eventual payment by the bankruptcy trustee. Unlike oversecured creditors, undersecured creditors can receive no interest payments from the bankruptcy estate for their claim.²⁷ Finally, even oversecured creditors may desire a lifting of the stay to foreclose on collateral so as to assure their interest is adequately protected.

Courts that have considered the enforceability of prepetition waivers and stipulations granting relief from the automatic stay have disagreed as to what effect they should be given.²⁸ The courts' analysis and treatment of these waivers have been anything but uniform. This inconsistency leaves the status of waivers uncertain at best. Moreover, the myriad of possible bankruptcy situations in which this issue may arise creates further complexities. For example, in certain cases—single asset, single creditor—enforcement of the waiver would appear to be appropriate. Indeed, as we discuss later, waivers in this context do nothing more than “privatize” the bankruptcy proceeding or the common pool problem.²⁹ However, in cases where there are multiple creditors, such enforcement could seriously disadvantage the debtor and other creditors and frustrate the policies underlying the Bankruptcy Code.

Section I of this article reviews the historical notions of the automatic stay prior to and under the Bankruptcy Act of 1898 (the “Act”) as well as the legislative history of § 362 of the Bankruptcy Code of 1978 (the “Code”). Section II focuses on the arguments for and against upholding the validity of agreements which waive the protections of the automatic stay. Specifically, this section analyzes recent court decisions in this area and attempts to discern differences between permissible and impermissible waivers. Section III reviews the enforceability of other prepetition agreements. In Section IV, we introduce our hypothesis, based fundamentally on economic principles, that notwithstanding recent judicial decisions to the contrary, debtors should be permitted to waive their rights to an automatic stay where such a waiver effectuates a privatization between one debtor and one creditor of the common pool problem. Returning to more practical issues, Section V concludes by discussing concerns regarding waivers and by advising parties on how best to proceed when drafting such provisions.

I. HISTORICAL DEVELOPMENT OF THE AUTOMATIC STAY

The first English statutes on bankruptcy gave the creditors of an individual, at that time usually a merchant, various rights as a group that they did not enjoy as individual creditors. An Act Against Such Persons as do Make

26. Mark Albright, *Bankruptcy Judge Okays Hilton Plan*, ST. PETERSBERG TIMES, Mar. 31, 1994, at 1E; Phyllis Furman, *Fight Looms over Growing Macy's Spoils*, CRAIN'S N.Y. BUS., Mar. 21, 1994, at 1; Matt Roush, *Tower Bus' Trip through Chapter 11 Ends Well*, CRAIN'S DET. BUS., Jan. 24, 1994, at 9.

27. 11 U.S.C. § 506 (1994).

28. *In re Powers*, 170 B.R. 480, 482 (Bankr. D. Mass. 1994).

29. See *infra* notes 224–29 and accompanying text.

Bankrupt,³⁰ enacted in 1542, provided that any grieved party could bring an action against the debtor if the debtor committed various acts hindering creditors' attempts to collect their debts. These acts included "keeping house" or flight "to parts unknown."³¹ The act of keeping house was the practice of isolating one's self at home, protected by the "English maxim that a man's house is his castle," thus rendering one's self "immune to forcible intrusion by legal process."³² The bankruptcy statutes gave the Lord Chancellor authority, upon the request of creditors, to gather the debtor's assets together and distribute them "to every of the said creditors a portion, rate and rate alike, according to the quantity of their debts."³³

These early English statutes provide the historical backdrop for the sequestration of a debtor's assets and the restraints placed on creditor's attempts to collect the debts owed to them. One stark difference between early English bankruptcy and the modern form is that in 16th century England, debtors did not receive a discharge of their debts after their assets were distributed among their creditors. If debts were not fully satisfied after the distribution of the assets, creditors had every remedy they had "before the making of this act."³⁴

The concept of bankruptcy took root in the United States during colonial times. During the Continental Congress in Philadelphia in 1787, Charles Pickney of South Carolina motioned that congressional power extend "to establish uniform laws upon the subject of bankruptcies" under Article I of the Constitution. Congress debated the motion sparingly and the bankruptcy clause was quickly adopted as part of the Constitution.³⁵

After a financial crisis in the 1790s led to large business failures, Congress exercised its bankruptcy power for the first time in 1800 by passing a five year interim statute which was repealed in only three years.³⁶ Congress passed and repealed several bankruptcy bills between 1800 and 1874. When the Bankruptcy Act of 1867 was repealed in 1878, commercial organizations called for a new bill.³⁷ In 1882, Kansas Senator John Ingalls introduced the predecessor to the modern automatic stay provision in a bill entitled Equity Bankruptcy.³⁸ His amendment to that bill stated that "[t]he court may, at any time during the proceedings, order that all or any other proceedings be stayed

30. Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy*, 52 HARV. L. REV. 189, 190 (1938) (citing 34, 35 Henry VIII ch. 4 (1542)).

31. *Id.* at 194. It was a regular custom in continental Europe for debtors to flee from creditors. Flight was very much a product of the harsh treatment by medieval laws of insolvent debtors. *Id.* at 193.

32. *Id.* at 194. The notion of a man's home being his castle was quite evident in these statutes. The English common law, unlike the laws in the rest of Europe at that time, provided that creditors could not enter a debtor's home to collect a debt. As a result, the practice of "keeping house" or cloistering one's self in one's house became a problem for Parliament to address. This practice owed its existence to the "sanctity with which the common law had invested in the Englishman's home." Israel Treiman, *Escaping the Creditor in the Middle Ages*, 43 L.Q. REV. 230, 233 (1927). Interestingly, although the practice of keeping house became punishable, creditors were still not able to enter the house of a debtor to collect a debt as was the case in France, Spain and Italy at the time this statute was passed. See Treiman, *supra* note 30, at 194.

33. Treiman, *supra* note 30, at 195 n.21 (citing 34, 35 Henry VII ch.4 (1542)).

34. *Id.*

35. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 4-5 (1935).

36. *Id.* at 19.

37. *Id.* at 127-28.

38. *Id.* at 152.

or dismissed.”³⁹ He explained that the purpose of his amendment was to preserve the entire estate of the bankrupt business for the creditors and customers who have an interest in keeping the business afloat.⁴⁰ Senator Ingalls recognized that a short forbearance would sometimes be all a debtor needed to get financially healthy again, and he sought to change what he saw as bankruptcy’s potential for destruction into a potential for preservation and assistance.⁴¹

Senator Ingalls’ reform attempts, however, were not immediately successful—Congress rejected a new bankruptcy bill almost annually until 1890 when the Torrey Bill was introduced into the House of Representatives and passed after only two days of debate.⁴² Although it was not passed by the Senate, it was modified and reintroduced several more times. It was passed again by the House in 1896 and by the Senate in 1897.⁴³ President McKinley signed the Bankruptcy Act in 1898.⁴⁴ The Act retained the English notion of a debtor committing “acts of bankruptcy,” but modernized it by eliminating, among other things, provisions for punishing the practices of keeping house and flight to parts unknown.⁴⁵ The Act not only provided creditors with an effective means for gathering and selling the assets of a debtor, but also provided debtors with a discharge for past debts.⁴⁶

At the same time that Congress was debating national bankruptcy laws, states were enacting various stay-laws which prolonged the period when debtors’ property would be exempt from execution of foreclosure. Although the Supreme Court held these laws to be invalid as impairment of contract,⁴⁷ legislators nevertheless continued to pass stay-laws.⁴⁸

The Act was amended several times during its life, most notably in 1938 with the passage of the Chandler Act.⁴⁹ One important intent of the Chandler Act was to provide businesses with bankruptcy protection while they were in the process of getting their financial houses in order.⁵⁰ A significant aspect of the Chandler Act was thus an automatic stay provision which allowed a debtor time to reorganize her business. The law provided the bankruptcy court with wide ranging powers to oversee and protect the estate of the debtor.⁵¹ Specifically, the Chandler Act provided for the staying of creditors’ claims brought against the debtor: “[a] suit which is founded upon a claim from which

39. *Id.* at 152–53.

40. *Id.* at 153.

41. *Id.*

42. *Id.* at 123–34.

43. *Id.* at 134–42.

44. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898), amended by Bankruptcy Act of 1933 (Bankruptcy Act), ch. 204, 47 Stat. 1467, repealed by Bankruptcy Code.

45. Bankruptcy Act, ch. 541, 30 Stat. 544, 546 (1898).

46. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898), amended by Bankruptcy Act of 1933 (Bankruptcy Act), ch. 204, 47 Stat. 1467, repealed by Bankruptcy Code.

47. WARREN, *supra* note 35, at 150.

48. *Id.* at 150–51.

49. Bankruptcy Amendments (Chandler) Act, ch. 575, 52 Stat. 840 (1938), repealed by Act of Nov. 6, 1978, Pub. L. No. 95–598, 92 Stat. 2549.

50. Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. REV. 581, 587–88 (1993).

51. Section 2(a) of the Bankruptcy Act of 1898 gives courts authority to “allow claims, disallow claims, reconsider allowed or disallowed claims, and allow and disallow them against the bankruptcy estate.”

a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition...."⁵²

In 1970, Congress created the Commission on the Bankruptcy Laws to study the Act and recommend possible changes to it.⁵³ Three years later, the Commission reported their findings to Congress and submitted a bill with their recommendations.⁵⁴ These findings were disputed by the National Conference of Bankruptcy Judges, which proposed an alternative bill. In time, both bills were introduced into Congress.⁵⁵ Ultimately, after both bills were reviewed in the course of extensive hearings and testimony, the Bankruptcy Code was enacted in 1978 with § 362 providing:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 U.S.C.A. § 78eee(a)(3)] operates as a stay, applicable to all entities....⁵⁶

The legislative history of the Code indicates that the drafters recognized the impact that the automatic stay has upon creditors, as well as the inadequacy of the stay provisions to provide creditors relief when collateral deteriorates in value. The Senate Report stated that the automatic stay "seriously affects the rights of all of the debtor's creditors,"⁵⁷ and as a result, certain limitations, such as the requirement for adequate protection of the creditor's collateral, were placed on the continuance of the stay.⁵⁸ Protection in other forms was also extended to creditors. For example, if a creditor petitions the court for relief from the stay, she is given calendar priority by the court.⁵⁹

The legislative history elaborates upon the protection the automatic stay provides creditors. The House Report refers to the "common pool" problem which the automatic stay is designed to prevent.⁶⁰ The premise of the common pool problem is that the interests of an individual frequently run counter to the interests of the group as a whole. In bankruptcy terms, this means that the

52. Bankruptcy Amendments (Chandler) Act, ch. 575, 52 Stat. 840, 849 (1938), repealed by Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (enacting Title XI).

53. See DAVID T. STANLEY & MARJORIE GIRTH, *THE BROOKINGS INSTITUTION, BANKRUPTCY: PROBLEM, PROCESS, REFORM 2-7* (1971).

54. REPORT OF THE COMM'N ON THE BANKRUPTCY LAW OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 1 (1973).

55. They were introduced as H.R. 10792, 93d Cong., 1st Sess. (1973), and H.R. 16643, 93d Cong., 2d Sess. (1974).

56. 11 U.S.C. § 362(a).

57. S. REP. No. 989, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5790.

58. 11 U.S.C. § 362(f).

59. S. REP. No. 989, *supra* note 57, reprinted in 1978 U.S.C.C.A.N. at 5790-91. 11 U.S.C. § 362(e) provides that the court must rule on a creditor's petition for relief from the stay within 30 days. Otherwise, the stay terminates automatically.

60. H.R. REP. No. 95-595, 95th Cong., 1st Sess. 340-42 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 49-51 (1978), reprinted in 1978 U.S.C.C.A.N. at 5786, 5835, states that the automatic stay

provides creditors protection. Without [the stay], certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

interests of a single creditor in collecting her debt often conflict with the interests of a group of creditors.

The common pool is nicely illustrated with the image of a lake filled with fish.⁶¹ If each individual is free to fish as much as they want, each would try to catch as many fish as possible. Even if these individuals would realize the benefits of catch limits, they might also realize that unilaterally limiting their own fishing would not necessarily ensure a good supply of fish. To the contrary, each person might believe that her restraint would benefit the others and only harm herself while the supply of fish continued to dwindle. Each person's interest would dictate that she catch as many fish as she could; this, of course, contradicts the interest the group has in the continuing availability of the fish. In short, without a device for restraining the group, an individual has a disincentive to practice self-restraint. We will return to the notion of the common pool again in Section IV of this article.

II. JUDICIAL TREATMENT OF WAIVERS OF THE AUTOMATIC STAY

The legislative history of the stay provision states that § 362 "stops all collection efforts...and all foreclosure actions."⁶² Yet Congress included several exceptions to the automatic stay provision.⁶³ Nothing in the legislative history of the Code, however, addresses the concept of a debtor being able to voluntarily waive the protection granted by Congress.

In discussing the enforceability of waivers of the automatic stay under the Code, some courts have emphasized the lack of explicit recognition of waivers under the Code as opposed to the Act.⁶⁴ Courts have suggested that this change is a signal that Congress intended to prohibit debtors from waiving the protection of the automatic stay.⁶⁵ Importantly, however, the waiver provisions under the Act were limited to unsecured creditors and to dischargeable debts.⁶⁶ Other courts have denied the validity of waiver provisions, based on notions of

61. For an enlightening discussion of the common pool problem, see DOUGLAS BAIRD & THOMAS JACKSON, *BANKRUPTCY* 31 (1985).

62. S. REP. No. 989, *supra* note 57, reprinted in 1978 U.S.C.C.A.N. at 5840.

63. Among these express exclusions are those for criminal and regulatory actions. See 11 U.S.C. § 362(b).

64. Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982); *In re Sky Group Int'l*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989).

65. *Sky Group*, 108 B.R. at 89.

66. While the Act did not contain a single automatic stay provision like § 362 of the Code, it provided an amalgam of provisions with different staying effects upon various actions against the debtor or property of the estate. Stays against certain actions were self-executing, while stays against other actions required some affirmative action by the debtor or trustee. Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 177, 194-95 (1978). This hodgepodge of protection is important for analyzing certain express authorizations to waive the stay. For example, Rule of Bankruptcy Procedure 401, under the Act, stated "the stay shall continue until...the bankrupt is denied a discharge or waives or otherwise loses his right thereto." FED. R. BANKR. P. § 401 (1973). Thus, if a debtor wanted to waive her right to discharge of a certain debt, pursuant to § 11 of the Act, she would also waive her right to stay certain methods of enforcement and collection of that debt. Compare, however, Rule 601, which stayed enforcement of liens and did not provide express authorization to waive the automatic stay. Accordingly, unsecured creditors could get relief from the stay by waiver, while, by negative implication, secured and lien creditors could not. See old Fed. R. Bankr. P. §§ 401, 601, 411 U.S. 989 (1973).

congressional purpose.⁶⁷ As they have noted, one of the fundamental purposes of the automatic stay is to protect creditors as well as debtors from a race to the courthouse to carve up the debtors' estate.⁶⁸

Most bankruptcy courts appear to agree that waivers are not self-executing—creditors must apply to the court for relief. Section 362(d) empowers the bankruptcy court to grant a stay of relief to a "party in interest" if "cause" exists to do so, after notice and a hearing.⁶⁹ The Code does not define "cause" and leaves that determination to the courts. Thus, the question facing courts is whether a waiver constitutes "cause" to lift the stay. In answering that question courts have generally examined the policies underlying the Code.

Courts which have upheld the validity of waivers generally do so under one of two theories. The first is that a prepetition agreement of the debtor to waive her protection under the automatic stay in the event she files for bankruptcy constitutes "cause" to lift the stay under § 362(d)(1).⁷⁰ Some courts reason that since the debtor specifically agreed to the waiver, usually with the advice of counsel, they are part of the basis of the creditor's bargain and the debtor should be held to their part of the agreement.⁷¹ The second theory used by courts to uphold prepetition agreements waiving the stay is the bad faith argument.⁷² Courts have the authority to convert a Chapter 11 filing to a Chapter 7 liquidation or to dismiss the bankruptcy petition outright if the court finds that there is cause.⁷³ While the term "cause" as used in § 1212 is not defined, it is well established that a Chapter 11 petition filed in bad faith constitutes cause to dismiss the case.⁷⁴ If a court dismisses a case, the automatic stay no longer protects the debtor's property from foreclosure or from repossession by the creditors. In some cases, courts have stated that debtors who have agreed to waive the protection of the stay, but then filed for bankruptcy and sought protection under the stay, filed their petitions in bad faith with the intent to hinder the collection efforts of their creditors.⁷⁵

A discussion of some of the most recent cases addressing the validity of these waivers will provide better insight into what courts find permissible and impermissible. We will first examine those cases which have upheld waiver agreements and then turn to those that have denied enforcement of waivers.

67. See, e.g., *In re BNT Terminals*, 125 B.R. 963, 973 (Bankr. N.D. Ill. 1991) (disallowing "exactly the type of transfer that the automatic stay is intended to prevent").

68. H.R. REP. No. 595, *supra* note 24, reprinted in 1978 U.S.C.C.A.N. at 6297.

69. 11 U.S.C. § 362(d).

70. See, e.g., *In re Hudson Manor Partners*, No. 91-81065HR, 1991 WL 472592 (Bankr. N.D. Ga. Dec. 31, 1991) ("cause" existed under § 362(d)(1)).

71. *In re Gulf Beach Dev. Corp.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985); *In re B.O.S.S. Partners I*, 37 B.R. 348 (Bankr. M.D. Fla. 1984); *In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994).

72. See, e.g., *In re Orange Park S. Partnership*, 79 B.R. 79 (Bankr. M.D. Fla. 1987).

73. Section 1112(b) of the Code provides, in relevant part, "[T]he court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause...." 11 U.S.C. § 1112(b) (1994).

74. *In re Waldron*, 785 F.2d 936 (11th Cir. 1986), cert. dismissed sub nom. *Waldron v. Shell Oil Co.*, 478 U.S. 1028 (1986); *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.*, 779 F.2d 1068 (5th Cir. 1986); *In re Wamsganz*, 54 B.R. 759 (Bankr. E.D. Mo. 1985).

75. *Orange Park S. Partnership*, 79 B.R. at 81, 82-83.

A. Enforcement of Waivers

As bankruptcy courts gain more experience evaluating waivers, a clearer framework for analysis is likely to develop. To date, however, courts have articulated two policy considerations in support of waiver enforcement. First, courts have given substantial weight to encouraging out-of-court workouts and restructurings. The Code itself recognizes that bankruptcy may not always prove to be the optimal solution.⁷⁶ Second, some courts have also intimated that market-wise, knowledgeable, commercial entities should be free to contract away certain rights. Bankruptcy seriously modifies contractual arrangements, however. Small modifications in the bankruptcy process may constitute a significant infringement on a party's freedom to contract. Thus, courts invariably distinguish waiver of the stay from waiver of the right to file bankruptcy. As these courts have maintained, a debtor may waive a single right, yet still avail itself of the multitude of other bankruptcy rights and receive a "fresh start."

Courts have held that knowledgeable and commercial-wise parties who freely enter into contracts should be held to those agreements in the absence of a compelling reason making enforcement unreasonable.⁷⁷ "[T]here is perhaps no higher public policy...than to uphold contracts validly entered into and legally permissible in subject matter....Contracts entered into 'freely and voluntarily' are to be held 'sacred', and courts 'are not lightly to interfere with this freedom of contract.'"⁷⁸ Because bankruptcy modifies contractual arrangements, courts distinguish a waiver of the automatic stay from a waiver of the right to file bankruptcy.⁷⁹ In *In re Adana Mortgage Bankers, Inc.*,⁸⁰ the court held that a waiver of the right to file bankruptcy is void, even if it is a bargained-for and knowledgeable one. The court relied on *Fallick v. Kehr*⁸¹ and *Federal National Bank v. Koppel*⁸² in reaching its conclusion. Quoting *Koppel*, the court stated, "[t]he bankruptcy act would...be nullified in the vast majority of debts arising out of contracts, if [an advance waiver] were permissible."⁸³ The court also distinguished the Supreme Court's decision to enforce a cognovit note in *D.H. Overmeyer Co. v. Frick*,⁸⁴ on the grounds that it only concerned non-bankruptcy rights.⁸⁵ Despite those decisions, it is notable that a debtor may waive a single right yet still avail itself of the multitude of other bankruptcy rights, such as the power to reject executory contracts and the exclusive right to propose a reorganization plan for the first 120 days.⁸⁶

The problem, of course, is that in many cases, waiver of the automatic stay has the same effect as waiving the right to file bankruptcy. Although courts

76. See 11 U.S.C. § 305(a) (1994).

77. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

78. See *Parker Plaza W. Partners v. Unum Pension & Ins. Co.*, 941 F.2d 349, 352 (5th Cir. 1991).

79. *In re Club Tower L.P.*, 138 B.R. 307, 311 (Bankr. N.D. Ga. 1991); *In re Hudson Manor Partners*, No. 91-81065HR, 1991 WL 472592, *2 (Bankr. N.D. Ga. Dec. 31, 1991).

80. 12 B.R. 989 (Bankr. N.D. Ga. 1980), *vacated*, 687 F.2d 344 (11th Cir. 1982).

81. 369 F.2d 899 (2d Cir. 1966).

82. 148 N.E. 379 (Mass. 1925).

83. 12 B.R. at 1009 (citing *Koppel*, 148 N.E. at 380).

84. 405 U.S. 174 (1972) (Court defined a cognovit note as a device whereby the debtor consents in advance to the holder's obtaining judgment without notice or hearing.).

85. 12 B.R. at 1009.

86. 11 U.S.C. §§ 365(c), 1121(b) (1994).

have distinguished the two rights, a single asset debtor filing a bankruptcy petition has little use for other bankruptcy protections. But this position can lead to a slippery slope argument—if single rights may be waived, debtors may begin waiving rights other than the automatic stay. This could conceivably result in a flood of litigation. Presumably, courts would have to analyze each different type of waiver to determine whether the debtor is, in effect, waiving her right to file bankruptcy. While courts and creditors share the concern that a debtor will contract to waive the automatic stay and then later challenge the stipulation, courts have noted that waiver agreements may be a factor in deciding whether or not there is a bad faith filing, but will not be considered a bad faith filing *per se*.⁸⁷

In *In re Gulf Beach Development Corp.*,⁸⁸ one of the first cases to recognize the validity of a prepetition waiver, the court lifted the stay because the court found it inequitable to allow a debtor to prevent the running of the contractual condition while reaping the benefits of the release. The debtor had executed a workout agreement whereby each party released the other from all claims they may have, and the debtor agreed to the entry of a final judgment in a pending foreclosure action. The debtor then filed bankruptcy and argued that the foreclosure was stayed and the contractual agreement was invalid. The court disagreed, concluding that the debtor had no equity in the property and could not achieve a successful reorganization.⁸⁹ Thus, the indirect waiver of the stay appeared to be valid in bankruptcy, but the extent to which it necessitated lifting the stay remained unclear.

Similarly, subsequent cases upheld the validity of indirect waivers of the stay.⁹⁰ However, the enforcement was consistently within the context of a bad faith filing. Because the courts aggregated the concepts of bad faith filing with the validity of the waiver, the question of whether a waiver alone constituted “cause” remained unclear.

*In re B.O.S.S. Partners I*⁹¹ began a string of cases decided in the bankruptcy court of the Middle District of Florida which held that freedom of contract prevailed over any prohibitions the Code may place on waivers of the automatic stay. In this case, one of the creditors motioned for relief from the stay. While the motion was pending, the debtor and creditor entered into a stipulation which provided that the stay would be waived if the asset was not sold by a specific date. The court began its discussion by reaffirming the principle that “a stipulation freely entered into by the parties is binding on the parties.”⁹² Despite the court’s recognition of the flexibility of the rule and its equitable powers under § 105 of the Code, it refused to modify the agreement. The court upheld the validity of the stipulation adding that once the parties have

87. Lisa H. Fenning et al., *Good Faith: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 11, 39 (1993).

88. 48 B.R. 40 (Bankr. M.D. Fla. 1985).

89. *Id.* at 43.

90. *In re Growers Properties No. 56, Ltd.*, 117 B.R. 1015 (Bankr. M.D. Fla. 1990); *In re International Supply Corp. of Tampa*, 72 B.R. 510 (Bankr. M.D. Fla. 1987); *In re Orange Park S. Partnership*, 79 B.R. 79 (Bankr. M.D. Fla. 1987).

91. 37 B.R. 348 (Bankr. M.D. Fla. 1984).

92. *Id.* at 350.

waived the protection of § 362, the debtor must “establish with persuasive evidence that the extraordinary remedy is warranted.”⁹³

In a second opinion written by Judge Paskay, the court in *In re Orange Park South Partnership*,⁹⁴ dismissed the case because the filing for bankruptcy was in bad faith. The creditor had foreclosed on the sole asset of the debtor and was about to sell the asset at a judicial sale when the debtor and creditor entered into an agreement. The debtor agreed to the appointment of a receiver; it acknowledged that there was no equity in the property; and it agreed that any bankruptcy filing would be unfounded and was filed for the sole purpose of delay.⁹⁵ The debtor failed to satisfy the debt and the creditor foreclosed on the property and prepared to sell it. When the debtor filed for bankruptcy four days prior to the sale, the creditor sued to enforce the debtor’s waiver. The court used its equitable power to dismiss the case and remove the protection of the automatic stay. The court held that the debtor’s lack of equity in the property, the presence of few unsecured creditors, the lack of employees, and the fact that the estate consisted of a single asset combined with the debtor’s waiver of its protection under the stay compelled the court to dismiss the filing for bad faith.⁹⁶ With regard to the validity of the stipulation containing the waiver provision, the court said “there is absolutely nothing in this record which would warrant the conclusion that the stipulation was obtained either by coercion, fraud or by mutual mistake of material facts which have been traditionally recognized as the only valid bases to rescind an agreement.”⁹⁷

In spite of its questionable reasoning, *In re Citadel Properties, Inc.*⁹⁸ has become the leading authority supporting the enforcement of prepetition waivers of the right to an automatic stay. As part of a workout, the debtor in that case agreed to waive the automatic stay in the event of bankruptcy in return for forbearance from the lender in enforcing the previously obtained foreclosure judgment against the debtor’s sole asset. When the debtor subsequently filed for relief under Chapter 11, the court enforced the waiver against the debtor.⁹⁹ In support of its holding, the court failed to offer any substantive analysis on this point, but merely cited three cases from the Middle District of Florida Bankruptcy Court, all decided by Chief Judge Paskay.¹⁰⁰ Despite the fact that none of these cases was apposite,¹⁰¹ the court held that the stipulation was binding on the parties since the debtor did not waive its entire protection in bankruptcy, just the protection afforded by § 362. The court also attempted to clarify the waiver’s status, at least to the extent that waivers were more than a factor that could constitute “cause” standing alone. The court held that the waiver was “binding upon the parties and that sufficient cause exist[ed] to lift

93. *Id.* at 351.

94. 79 B.R. 79 (Bankr. M.D. Fla. 1987).

95. *Id.* at 82.

96. *Id.* at 81–82.

97. *Id.* at 82.

98. 86 B.R. 275 (Bankr. M.D. Fla. 1988).

99. *Id.* at 276.

100. *In re International Supply Corp.*, 72 B.R. 510 (Bankr. M.D. Fla. 1987); *In re Gulf Beach Dev.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985); *In re B.O.S.S. Partners I*, 37 B.R. 348 (Bankr. M.D. Fla. 1984). Judge Paskay enforced the prepetition agreements granting creditors the right to relief from the automatic stay.

101. See Bassin, *supra* note 18, at 9–11.

the automatic stay."¹⁰² Moreover, the court offered an alternative holding that "cause" existed to lift the stay because the debtor filed in bad faith. Thus, according to this court, a waiver can constitute "cause" standing alone.¹⁰³

In one of the first cases to provide any substantial analysis of the waiver issue, the court in *In re Club Tower L.P.*¹⁰⁴ granted a creditor's motion to lift the automatic stay over the opposition of a Chapter 11 debtor because the court found that the debtor had filed in bad faith—the debtor agreed to a provision in a prepetition workout agreement which granted immediate relief from the stay if it filed a bankruptcy petition.¹⁰⁵ The court cited *Citadel* and *Orange Park* for the proposition that prepetition waivers are generally enforceable in bankruptcy.¹⁰⁶ The court then went on to discuss the policies of encouraging workouts and relinquishing only a "single bankruptcy right."¹⁰⁷ Based on these reasons, the court held that the waiver constituted "cause."¹⁰⁸ However, as in *Citadel*, the court made an alternative holding that the debtor filed in bad faith and such action also constituted "cause."¹⁰⁹

The court went on to differentiate the enforcement of a waiver of the automatic stay from enforcement of a waiver of the right to file, implying that the latter violates public policy.¹¹⁰ The court maintained that the debtor had waived only a single protection of the Code, rather than all of the rights and benefits provided by the Code.¹¹¹ The court reasoned that the debtor had already received the benefit of the automatic stay during the pendency of the lift-stay motion and nothing in the Bankruptcy Code guaranteed that the stay would remain in effect throughout the case.¹¹² As a final point, the court held that enforcing workout agreements furthered the legitimate public policy of encouraging out-of-court restructuring and settlements.¹¹³

On facts similar to *In re Citadel Properties*,¹¹⁴ the Georgia Bankruptcy Court found, in *In re Hudson Manor Partners, Ltd.*,¹¹⁵ that there was no violation in enforcing the waiver because the debtor still had all the rights afforded by the Code. This was the first unadulterated holding that a waiver was enforceable standing alone without an alternative finding of proof of bad faith. While the court noted that a prohibition against filing for bankruptcy would be against public policy, the court found that a debtor cannot avail herself of protection under § 362 in an attempt to avoid a previous contract

102. *Citadel*, 86 B.R. at 276.

103. *Id.*

104. 138 B.R. 307 (Bankr. N.D. Ga. 1991).

105. *Id.* at 310–11.

106. *Id.* at 311.

107. *Id.*

108. *Id.*

109. *Id.* at 310.

110. *Id.* at 311.

111. *Id.*

112. *Id.*

113. *Id.* at 312 (citations omitted).

114. The debtor defaults on the loan payments, the creditor forecloses, the parties stipulate to a forbearance agreement in exchange for the debtor's waiving the protection of the automatic stay in the event of bankruptcy, the debtor cannot rehabilitate itself and defaults a second time, the creditor forecloses again and prepares to sell the property at a judicial sale and, at the last possible minute, the debtor files for bankruptcy and seeks protection under § 362. *See supra* notes 98–103 and accompanying text.

115. No. 91–81065HR, 1991 WL 472592 (Bankr. N.D. Ga. Dec. 31, 1991).

made with a lender. Relying on *Citadel*, the court found that the waiver constituted a "cause" to lift the stay. While the court did not limit its decision to its facts, the court did state that "[i]n situations such as this, i.e., a dispute between essentially two parties over a single real estate asset, workouts should be encouraged."¹¹⁶

A recent bankruptcy court decision in South Carolina, *In re Cheeks*,¹¹⁷ adds further authority to this line of cases. In *Cheeks*, a Chapter 13 debtor who had waived her right to contest the lender's lift-stay motion six months prior to filing did, in fact, oppose it. The court enforced the agreement and lifted the stay.¹¹⁸ The public policy in favor of encouraging out-of-court settlements was listed by the court as the most compelling reason for enforcement of the waiver. As the court found, the debtor had received relief under the forbearance agreement approximating that which would have been available in a bankruptcy proceeding. Accordingly, the court held that to allow the debtor to receive the full benefits resulting from reimposition of the automatic stay would be inconsistent with the court's "oft-stated skepticism regarding serial bankruptcy filings."¹¹⁹ As in *Club Tower*, the court noted that the debtor had elected to forego only a single benefit of the Bankruptcy Code in exchange for the creditor's forbearance.¹²⁰ Finally, the court stated that a waiver "do[es] not oust th[e] Court's Jurisdiction to hear objections to stay relief filed by other parties in interest"; it simply means that no weight will be given to the debtor's objections.¹²¹

One of the most difficult issues involving waiver enforceability arises in the serial filing cases. Occasionally, a bankruptcy court order or a stipulation approved by a bankruptcy judge will contain a provision which provides for relief from the stay in the first case and even purports to provide for relief from the stay in a later case. In several cases, the prior relief from stay order has been enforced using a *res judicata* analysis, although it is difficult to substantiate this reasoning in a later case in which the facts are necessarily at least somewhat different.

In perhaps the leading case in this area, the court in *In re Franklin*,¹²² in the third of five serial filings, upheld an order entered by the bankruptcy court in the second bankruptcy case granting prospective relief from the automatic stay in future bankruptcy proceedings pursuant to a stipulation of the parties. The secured creditor had concluded a foreclosure sale three days after the third bankruptcy petition was filed. The debtor attempted to

116. *Id.* at *2. The most recent case on this issue involved a hybrid waiver. In *In re Wheaton Oaks Office Partners*, No. 92 C 3955, 1992 WL 381047 (Bankr. N.D. Ill. Dec. 10, 1992), the court held that a plan of reorganization in a separate bankruptcy proceeding which permitted foreclosure proceedings in the event of default constituted "cause" in the instant bankruptcy proceedings. Thus, the plan was post-petition in the first proceeding, but prepetition in the second. Nevertheless, the court relied on *Citadel* and *Club Tower* in its decision. *Id.* at *1.

Another interesting waiver issue arose in *Smith v. Commissioner*, 96 T.C. 10 (1991). In this instance the bankruptcy court approved a post-petition waiver of discharge for tax liabilities of the debtor. The tax court held that by waiving discharge the tax court proceedings were not stayed. *Id.* at 16-17.

117. 167 B.R. 817 (Bankr. D.S.C. 1994)

118. *Id.* at 820.

119. *Id.* at 819.

120. *Id.* at 818-19.

121. *Id.* at 819.

122. *In re Franklin*, 802 F.2d 324 (9th Cir. 1986).

set aside the foreclosure sale, arguing that the sale was prohibited by the automatic stay invoked by the third bankruptcy filing. The bankruptcy court, upholding the order entered in the second case, held that the third petition did not impose the automatic stay and that the sale was valid. The debtor appealed on the grounds that the bankruptcy judge in the second case had no jurisdiction to lift the stay in future filings by means of a stipulated agreement or order. The district court and the Ninth Circuit Court of Appeals both affirmed the bankruptcy court's decision holding that the previous bankruptcy court had jurisdiction to approve the stipulation and that the stipulation removed the property from any automatic stay imposed through future filings.¹²³

The Ninth Circuit reached the same result in *In re Springpark Associates*.¹²⁴ Here, the debtors filed a Chapter 12 petition in which they executed a stipulation regarding refinancing of certain debts. The stipulation included provisions that the automatic stay was terminated and established a waiting period before which a foreclosure date could be set and advertised. The debtors' Chapter 12 case was voluntarily dismissed, but the refinancing never materialized and the debtors filed a second Chapter 12 petition, seeking to invoke the automatic stay. The creditor, a party to the stipulation approved in the first Chapter 12 case, sought relief from the automatic stay. The bankruptcy court held that the parties were bound by the stipulation approved in the previous bankruptcy case, stating that "irreparable harm" would be caused to creditors and to the judicial process if the stipulation was not enforced.¹²⁵

In a similar decision, the court for the Central District of California in *In re Abdul-Hasan*,¹²⁶ enforced the provisions in an order for relief from stay granted in a prior Chapter 13 case and ruled that the prospective relief set forth in the prior order remained in effect in the subsequent bankruptcy case. The court further held that prospective relief granted in the prior Chapter 13 removed any requirement that the creditor seek relief from the automatic stay in any subsequent filing.¹²⁷ The court based its decision on the principles of collateral estoppel and *res judicata*. As the court noted, the debtor was collaterally estopped from attacking the previous order granting prospective relief. Further, even if collateral estoppel did not prevent the debtor's attack, *res judicata* did. The prior order was binding in a subsequent action involving the same parties and the same issues.¹²⁸ The court rejected the debtor's argument that the issues presented were different because there had been a "change in circumstances," noting that if there had been a true change in circumstances at the time of the subsequent filing, the debtor could have sought a temporary restraining order and injunction under § 105 of the Code to extend the automatic stay to the secured creditor. The court also noted that while it would have been "more comfortable" if the original order had a six to twelve month time limit, the fact that eighteen months had passed between the entry of the original order and the filing of the subsequent case did not present

123. *Id.* at 326.

124. 623 F.2d 1377 (9th Cir. 1980), *cert. denied sub nom.* Springpark Assoc. v. Crown Life Ins. Co., 449 U.S. 956 (1980).

125. *Id.* at 1381.

126. 104 B.R. 263 (Bankr. C.D. Cal. 1989).

127. *Id.* at 266.

128. *Id.* at 266-67.

a challenge to an estoppel or laches position that would prevent enforcement of the order.¹²⁹

B. Denial of Waivers

As the cases above demonstrate, it is unclear whether a waiver is merely a factor to consider in determining whether "cause" exists or whether it is strictly enforceable. An obvious and important factor is the context under which the waiver is executed. The leading cases have so far involved one large secured creditor and a few small unsecured creditors. However, if unsecured creditors could utilize waivers, bankruptcy would not prevent them from obtaining a judgment lien and levying on the debtor's property or simply allowing their claim to survive resolution of the case. These unsecured creditors could thereby gain priority over other unsecured creditors, and avoid dischargeability provisions. Undersecured creditors could apparently achieve the same result with respect to the unsecured portion of their claim. Indeed, undersecured creditors have a stronger argument for lifting of the stay because they have more to lose than fully or oversecured creditors. Oversecured creditors may receive adequate protection for the depreciation of the property and interest on their claim while undersecured creditors do not.¹³⁰

Certainly, debtors and other creditors could argue that enforcement of a waiver would produce an inequitable result if the secured creditor was allowed to foreclose on property that was necessary to a feasible reorganization. In such cases, the Code's policies of a "fresh start" and creditor protection would seem to overshadow the policy of encouraging out-of-bankruptcy workouts. Moreover, if a debtor's business has a "going concern" value greater than the value of its individual parts, a policy which assures the most value for the property of the estate should come into play. Finally, as Peter Partee has observed, the enforceability of waivers may also depend upon the jurisdiction's law concerning standing to invoke protection of the automatic stay.¹³¹ In those jurisdictions where creditors have standing, they may be able to prevent a debtor from waiving the stay because the debtor would be unable to contract away the rights of creditors not party to the agreement. In other jurisdictions, debtors would be able to waive the stay.

One thing seems clear: even when a waiver agreement purports to be self-executing, courts have unanimously held them not to be so.¹³² The rationale behind this rule should be readily apparent. The stay is intended to benefit not only the debtor, by granting the debtor relief from the financial pressures that

129. *Id.*

130. *See supra* notes 26-27 and accompanying text.

131. Partee, *supra* note 14, at 7-8.

132. *See In re Powers*, 170 B.R. 480 (Bankr. D. Mass. 1994):

[The lender] did not take literally the language of the Agreement that its approval "shall constitute relief...from the automatic stay pursuant to section 362" but instead sought to obtain that relief from the Court. It is well that it did so, for I agree with Judge Markovitz that "the contention that this waiver is enforceable and self-executing is without merit." A motion for relief under § 362 is required for enforcement.

Id. at 483 (citation omitted).

led to bankruptcy,¹³³ but also the creditors as a group.¹³⁴ By protecting creditors through limitations on an individual creditor's rights to pursue its own remedies against the debtor's property—an orderly liquidation is ensured in which all creditors are treated equally.¹³⁵ A creditor that acts against the debtor without moving to lift the stay may be penalized by the court.¹³⁶

In one of the leading cases on self-execution, *In re Sky Group International*,¹³⁷ the lender and debtor signed an Assumption Agreement pursuant to the acquisition of a hotel. The Agreement, which served as the financing instrument, provided that if the debtor filed for bankruptcy or an involuntary petition was filed against it, it "consent[ed] to relief from the automatic stay imposed by 11 U.S.C. § 362 to allow [the creditor] to exercise its rights and remedies hereunder with respect to the Debtor's property."¹³⁸ The debtor filed bankruptcy and the lender argued that not only was the waiver enforceable but that it was self-executing, without any other action by the debtor, creditors, or court.

The court held that the agreement was not self-executing and the creditor would still have to petition the court for relief. The court decided that the term "automatic" was operative here and meant that the stay is imposed without action by the debtor or the creditors.¹³⁹ Moreover, the court looked to the legislative history and determined that Congress intended the stay to not only protect debtors, but creditors as well. Without the stay, creditors would race to the courthouse to carve up the debtor's estate. The court found that:

[t]o grant a creditor relief from stay simply because the debtor elected to waive the protection afforded the debtor by the automatic stay ignores the fact that it also is designed to protect all creditors and to treat them all equally. The orderly liquidation procedure contemplated by the Code would be placed in jeopardy, especially where (as here) none of the creditors who brought the involuntary petition was a party to the Agreement in which the debtor allegedly waived its right to the automatic stay.¹⁴⁰

Likewise, in *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*,¹⁴¹ filed just a short time after the Code was enacted, the Third Circuit Court of Appeals held that an appeal of a lawsuit which involved

133. *In re Sky Group Int'l, Inc.*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989) (citing H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. at 5787, 5963, 6296-97).

134. *See In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994):

[T]he automatic stay comes about by operation of law and subsequently becomes lifted or modified only after a motion which is duly filed and served is heard. The bankruptcy code requires these steps and this procedure because creditors have a right under the Code to require that assets be marshalled in an orderly and equitable fashion.

Id. at 819. *See also Sky Group*, 108 B.R. at 88. ("The legislative history makes it clear that the automatic stay has a dual purpose of protecting the debtor and all creditors alike.")

135. *Sky Group*, 108 B.R. at 88; *see also Farm Credit v. Polk*, 160 B.R. 870, 873 (Bankr. M.D. Fla. 1993) (citing *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982)).

136. *See* 11 U.S.C. § 362(h); *In re Goodman*, 991 F.2d 613 (9th Cir. 1993).

137. 108 B.R. 86 (Bankr. W.D. Pa. 1989).

138. *Id.* at 88.

139. *Id.*

140. *Id.*

141. 682 F.2d 446 (3d Cir. 1982).

damages to be paid out of the debtor's estate would automatically be stayed because of § 362.¹⁴² In this case the hotel had filed for Chapter 11 protection during the pendency of an appeal from a judgment which had awarded damages on a counterclaim. The court noted the distinction between the Act, where debtors could waive the stay, and the Code, where the stay was automatic.¹⁴³ The court, again looking to the purpose Congress had in enacting § 362, said that the appeal of the debtor in the action did not act as a waiver of the automatic stay. The court discussed the broad scope of the stay and held that even if the debtor filed its petition before appealing the lower court decision, it did not waive the protection of the stay.¹⁴⁴

In a case analogous to *St. Croix*, the Second Circuit in *Ostano Commerzanstalt v. Telewide System*¹⁴⁵ recognized that even if a debtor agrees to waive the protection of the stay pursuant to a petition filed during an appeal, the waiver is still invalid. Here, the debtor had agreed that the stay did not have any effect on the appeal in process. The court invalidated the waiver using the same reasoning as the Third Circuit in *St. Croix* and held that the protection is "automatic and mandatory with the filing of the petition."¹⁴⁶

In another leading decision in this area, the court in *In re Powers*¹⁴⁷ acknowledged the prevalence of waivers in workout agreements, and while essentially following the reasoning in *Cheeks*, it significantly narrowed its holding. In *Powers*, the court held that a Chapter 11 debtor's prepetition waiver of the automatic stay was a "primary element" to be considered in determining if cause exists for relief from the automatic stay under § 362(d)(1).¹⁴⁸ Finding a duly-executed prepetition waiver, the court placed the burden upon the debtor to show that the court should not enforce it. However, unlike *Cheeks*, the debtor was not precluded from contesting the motion. The court ultimately declined to lift the stay without an evidentiary hearing to consider additional factors.¹⁴⁹

As framed, the facts in *Powers* offered little assistance to the debtor's cause. While in Chapter 11 for the first time, the debtor executed a workout agreement with mortgagee bank ("Haymarket") and then voluntarily dismissed the case.¹⁵⁰ The agreement included a provision allowing Haymarket to assert against the debtor its rights as mortgagee without seeking relief under the automatic stay. Two years later the debtor defaulted on the workout agreement, Haymarket began foreclosure proceedings, and the debtor filed a second Chapter 11 petition. Haymarket immediately sought relief from the stay, and the parties agreed to allow the court to first determine the efficacy of the waiver.¹⁵¹

The bankruptcy judge, Judge Hillman, stated that he would consider "extraordinary matters," such as radical and new developments which

142. *Id.* at 449.

143. *Id.* at 448.

144. *Id.* at 449.

145. 790 F.2d 206 (2d Cir. 1986).

146. *Id.*

147. 170 B.R. 480 (Bankr. D. Mass. 1994).

148. *Id.* at 484.

149. *Id.*

150. *Id.* at 482.

151. *Id.* at 481.

drastically changed the economic picture and value of the collateral, along with four other factors. The other four factors the court considered included: (1) the benefit which the debtor received from the workout agreement as a whole; (2) the extent to which the creditor waived rights or would be otherwise prejudiced if the waiver was not enforced; (3) the effect of enforcement on other creditors; and (4) whether there appeared to be a likelihood of a successful reorganization.¹⁵² The court's final decision in *Powers* has not been reported, but on these facts, the debtor would clearly have had a difficult time rebutting the waiver, considering the serial filing.

Taking a different approach, the court in *Farm Credit of Central Florida*¹⁵³ considered both competing lines of authority, *Citadel* and *Sky Group*, and chose to differentiate the case from the *Citadel* line based on the facts of the case before it. The court analyzed the *Citadel* line of cases and found that in each case the bankruptcy court, expressly or impliedly, determined that the debtor could not effectively reorganize.¹⁵⁴ Additionally, the *Farm Credit* court noted that, of the courts that have enforced prepetition waivers, many have done so in single asset cases where indicia of debtor bad faith were present.¹⁵⁵ In *Farm Credit*, the debtor's business operations included ranching, management of substantial commercial and investment properties, and a major heavy machinery repair business, which together employed a number of people, generated substantial income, and involved the types of activity for which Chapter 11 was designed.¹⁵⁶

Ultimately, the *Farm Credit* court found itself in agreement with the underlying rationale of *Sky Group*—the stay is intended to protect all creditors and to prevent the dissipation or diminution of the debtor's assets while rehabilitative efforts are undertaken.¹⁵⁷ The court adopted the position that prepetition agreements providing for the lifting of the stay are "not per se binding on the debtor, as a public policy position."¹⁵⁸ The court found support for its position in the policies behind the Code which it said were consistent with the purposes of the automatic stay: to protect the debtor's assets, to provide temporary relief from creditors, and to promote equality of distribution among the creditors by forestalling a race to the courthouse.¹⁵⁹

The final significant case in this area, *In re Jenkins Court Associates Limited Partnership*,¹⁶⁰ concluded that enforcing a prepetition waiver of the automatic stay "too closely approximates the more reviled prohibition against filing for bankruptcy protection."¹⁶¹ In *Jenkins*, the debtor obtained a construction loan in excess of \$17 million in 1989, granting the lender a mortgage and other rights as security. In 1992, the terms of the transaction were renegotiated and the debtor signed a waiver providing that if it sought bankruptcy protection: (1) the lender was entitled to immediate relief from the

152. *Id.*

153. 160 B.R. 870 (Bankr. M.D. Fla. 1993).

154. *Id.* at 872.

155. *Id.* at 873.

156. *Id.*

157. *Id.* (citing *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987)).

158. *Id.* at 873.

159. *Id.* (citing *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985)).

160. 181 B.R. 33 (Bankr. E.D. Pa. 1995).

161. *Id.* at 37.

stay; (2) the debtor had no equity in the project; (3) no chance of a successful reorganization existed; and (4) the debtor's filing was deemed to be commenced in bad faith per se if the debtor rejected or failed to honor the foregoing agreements.¹⁶² Sometime after September 30, 1994, the original lender, Fleet National Bank, assigned its rights under the loan agreement to Jenkins Court Pennsylvania Limited Partnership.¹⁶³ The debtor failed to locate permanent financing and ultimately filed a Chapter 11 petition on November 23, 1994.¹⁶⁴

On March 6, 1995, the court heard the secured creditor's motion to dismiss or, in the alternative, for relief from the automatic stay. As in *Powers*, the parties agreed that in lieu of an evidentiary hearing, the court should first determine whether the waiver of the automatic stay granted by the debtor to the secured creditor pursuant to the prepetition renegotiated agreement should be enforced.¹⁶⁵ In its opinion, the *Jenkins* court expressed that it was "somewhat perplexed" as to why the secured creditor agreed to bifurcate the issues and rest on the limited record.¹⁶⁶

The court refused to enforce the waiver of the automatic stay and denied the creditor's motions.¹⁶⁷ In reaching this result the court considered the public policies at stake, rather than merely relying on prior case law. Despite the court's acknowledgement that the most compelling reason for enforcing prepetition waivers was the public policy encouraging out-of-court restructuring and settlements,¹⁶⁸ the court determined that it must, as a court of equity, balance the moving party's right to rely on the terms of a bargained-for prepetition settlement agreement against the congressionally expressed public policy underpinning the Bankruptcy Code.¹⁶⁹

The court supported its holding by relying on several policy arguments. First, the court pointed to the long standing prohibition on consensual restraints against filing for bankruptcy. Although the court distinguished a waiver of the protection of the automatic stay from a blanket prohibition against filing, it recognized that in this context it may be "a distinction without a meaningful difference."¹⁷⁰ Second, the court expressed the public policy in favor of allowing debtors a breathing spell from creditors so that reorganization can be attempted.¹⁷¹ The court stated that the instant case was a paradigmatic example

162. *Id.* at 35.

163. *Id.*

164. *Id.*

165. *Id.* See also *In re Powers*, 170 B.R. 480, 481 (Bankr. D. Mass. 1994).

166. 181 B.R. at 36: "[The secured creditor's] exclusive reliance on the admissions in [the renegotiated agreement] as proof that (1) the [d]ebtor has no equity in the [p]roject and has no chance of a successful reorganization, and (2) that the [d]ebtor commenced this bankruptcy case in bad faith, is ill-founded." *Id.*

167. *Id.* at 37.

168. *Id.* at 36 (citing *In re Cheeks*, 167 B.R. 817, 819 (Bankr. D.S.C. 1994)).

169. *Id.* (citing *In re Tobago Bay Trading Co.*, 112 B.R. 463 (Bankr. N.D. Ga. 1990)).

170. *Id.* Referring to the language from *Citadel* that distinguished the enforcement of a waiver granting a lender relief from stay from the enforcement of a waiver of a debtor's right to file for bankruptcy, the *Jenkins* court held,

[t]his Court disagrees with that proposition as to the matter sub judice. As a practical matter, there may be little significant distinction between the enforcement of a pre-petition waiver of the automatic stay in a single asset case and the enforcement of a provision prohibiting the filing of a bankruptcy case in the first place.

Id.

171. *Id.* at 37.

of a single asset case: the debtor owned the property subject to a single secured claim. The debtor had very few other creditors, a limited number of employees, and its purpose was essentially limited to operation of the improvements that had been made to the property.¹⁷² The court held that, in single asset cases particularly, the public policy behind the automatic stay frequently outweighs the public policy which favors encouragement of out-of-court restructuring and settlements.¹⁷³

In reaching its decision, the court also focused on the tremendous impact that a prepetition waiver of the automatic stay can have on a case.¹⁷⁴ As the court noted, here, as in many single asset cases, enforcement of the waiver would remove the asset from the bankruptcy estate and instead pass it into foreclosure proceedings, thereby eliminating any possibility to formulate a repayment plan.¹⁷⁵

The *Jenkins* court in the end placed the waivers on the same footing as did the court in *Powers*, where the waiver was considered a "primary element" in ordering relief:¹⁷⁶

[T]hat is not to say that [the secured creditor] will not receive any benefit from the waiver. The follow-up hearing will not proceed on a blank slate. On the contrary, the Court will consider the representations in the Prepetition settlement agreement against whatever additional evidence might be forthcoming at the subsequent evidentiary hearing as a significant factor.¹⁷⁷

Importantly, in many cases the acts of a creditor are considered by law never to have happened if violative of the letter or spirit of the Bankruptcy Code. The general rule is that any act or occurrence that violates the automatic stay is void ab initio.¹⁷⁸ Terms in contracts triggered by a bankruptcy filing (so-called ipso facto clauses) also are generally held void.¹⁷⁹

The court's holding in *Sky Group* could be interpreted as placing waivers of the automatic stay in this category. In that case, the court gave no weight to the waiver when deciding whether to lift the stay.¹⁸⁰ But the *Sky Group* court did not hold that all such waivers are void; it merely refused to lift the stay on account of the waiver. Further, the court expressed concern regarding the rights of non-moving creditors which have now been effectively addressed by both the *Citadel* and *Powers* line of cases. These lines of cases enforce the

The automatic stay is one of the fundamental debtor protection[s] provided by the bankruptcy laws. It gives a debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. REP. No. 595, *supra* note 24, reprinted in 1978 U.S.C.A.N. at 5787, 5963, 6296-97.

172. *In re Jenkins*, 181 B.R. at 37.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See In re Powers*, 170 B.R. 480, 484 (Bankr. D. Mass. 1994) ("My view is that the waiver is a primary element to be considered in determining if cause exists for relief from the automatic stay under § 362(d)(1). However, the existence of the waiver does not preclude third parties, or the debtor from contesting the motion.")

177. 181 B.R. at 37.

178. DAVID G. EPSTEIN ET AL., BANKRUPTCY § 3-32, at 155 (1993).

179. *See Jenkins*, 181 B.R. at 36.

180. *In re Sky Group Int'l, Inc.*, 108 B.R. 86, 88 (Bankr. W.D. Pa. 1989).

waiver only against the debtor, by allowing non-moving creditors an opportunity to be heard.¹⁸¹

At least one commentator has suggested that a debtor's waiver of the automatic stay should be considered void as against public policy.¹⁸² William Bassin, whose article predates the *Cheeks*, *Powers*, and *Jenkins* decisions, makes several arguments to support this position. First, he argues that even if a statute prohibiting various activities does not explicitly prohibit enforcement of contracts with respect to those activities, a court can weigh the public policies at stake to determine whether unenforceability should be added to the sanctions provided by the legislature.¹⁸³ Second, Bassin contends that the orderly liquidation procedure contemplated by the Code would be placed in jeopardy if parties are allowed to independently contract out of the stay, and this would result in unpredictable outcomes at the hands of independent parties.¹⁸⁴ Finally, Bassin maintains that previous cases that enforced the waiver were not well reasoned, creating a "slippery slope" which would ultimately make the Bankruptcy Code an optional device.¹⁸⁵ Bassin also suggests that the policy of encouraging out-of-court restructuring is not promoted by enforcing prepetition waivers of the automatic stay.¹⁸⁶ Though voiding automatic stay waivers obtained in a workout agreement would be out of the current mainstream of judicial thinking, the idea merits serious discussion if the public policies supposedly served by enforcing the agreements in fact are not.

III. ENFORCEABILITY OF OTHER PREPETITION AGREEMENTS

Waivers of the right to automatic stay have rarely been considered in isolation; typically a workout agreement includes other waivers and stipulations. The most common additional waiver is a provision that any bankruptcy filing by the debtor is deemed to have been commenced in "bad faith." Another common waiver purports to exempt a particular debt from discharge in bankruptcy. These waivers are often supported by a stipulation listing numerous factors that would allow a court to reach the same conclusion.

A. "Bad Faith" Stipulation

Courts have been moved to dismiss a bankruptcy case because of a provision in a workout agreement stating that any subsequent bankruptcy filing is deemed to be commenced in bad faith.¹⁸⁷ Failing to file in good faith is

181. See *In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994); *In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991); *In re Hudson Manor Partners*, No. 91-81065HR, 1991 WL 472592 (Bankr. N.D. Ga. Dec. 31, 1991).

182. Bassin, *supra* note 18, at 10.

183. *Id.* at 1 (citing E. ALLEN FARNSWORTH, CONTRACTS §§ 5.1, 5.5, at 348, 371 (2d ed. 1990)).

184. *Id.* at 1, 13 (citing *Federal Nat'l Bank v. Koppel*, 148 N.E. 379, 380 (Mass. 1925)) ("[i]t would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect.").

185. *Id.* at 16.

186. *Id.* at 16-17.

187. Some of the reported decisions essentially apply the same analysis to prepetition good faith agreements and waivers of the automatic stay. See *In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991); *In re Citadel Properties*, 86 B.R. 275 (Bankr. M.D. Fla. 1988) (both enforcing prepetition waivers after finding significant indicia of bad faith). In other cases

widely accepted as adequate justification for dismissing a case.¹⁸⁸ Courts take into account the debtor's intent, as evidenced by the timing of the filing, and numerous objective factors when determining whether a debtor has filed a petition in good faith.¹⁸⁹

In *In re Jenkins*, the court refused to dismiss the case, despite the debtor's prepetition acknowledgment of lack of good faith.¹⁹⁰ The *Jenkins* court emphasized that the determination of whether a bankruptcy petition has been filed in bad faith is fact intensive.¹⁹¹ Since the secured creditor offered only a two year old prepetition settlement agreement into evidence, the court posited that it was not unreasonable to wonder whether the debtor's circumstances or market conditions may have changed since then, thereby "undercutting the thrust of the earlier representations."¹⁹² Thus, the court held that none of the indicia of bad faith had been proved to its satisfaction, and denied the secured creditor's motion to dismiss.¹⁹³ This holding is particularly noteworthy because *Jenkins* involved a typical single-asset real estate debtor. Despite the fact that such cases inherently show multiple indicia of bad faith, the court decided that the public policy of offering debtors "breathing space" took precedence.¹⁹⁴

B. Prepetition Waiver of Right to Discharge

Under § 727(a)(10) of the Code, the debtor may waive discharge of a debt if the waiver is executed in writing after the order for relief and then approved by the court.¹⁹⁵ However, the Code contains no explicit prohibition against prepetition waiver of the right to discharge. Notwithstanding this, courts have typically held these waivers void as against public policy.¹⁹⁶ The general rule is that all debts are dischargeable in bankruptcy unless specifically excepted by the Code or other applicable federal law.¹⁹⁷ Section 523 enumerates the exceptions to discharge, and does not except from discharge those debts which the debtor has agreed by contract shall not be discharged in bankruptcy.¹⁹⁸

the prepetition good faith agreement is considered independently. See *In re Jenkins*, 181 B.R. 33 (Bankr. E.D. Pa. 1995); *In re Aurora Invs.*, 134 B.R. 982 (Bankr. M.D. Fla. 1991); *In re Orange Park S. Partnership*, 79 B.R. 79 (Bankr. M.D. Fla. 1987).

188. See Note, *Prepetition Agreements and the Implied Good Faith Requirement*, 1 AM. BANKR. INST. L. REV. 197 (1993).

189. See *id.* The factors include whether: (1) the debtor has only one asset; (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors; (3) the debtor's one asset is the subject of a foreclosure action as a result of default on the debt; (4) the debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action; (5) the debtor has little or no cash flow; (6) the debtor can't meet current expenses, including the payment of personal property and real estate taxes; and (7) the debtor has no employees. *In re Phoenix Piccadilly*, 849 F.2d 1393, 1394-95 (11th Cir. 1988).

190. *In re Jenkins*, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

191. *Id.* at 36.

192. *Id.* The court did allow that its result might be different if the prepetition agreement were more proximate in time to the bankruptcy filing.

193. *Id.*

194. *Id.* at 37.

195. 11 U.S.C. § 727(a)(10) (1994).

196. Bassin, *supra* note 18, at 15 n.115.

197. *In re Levinson*, 58 B.R. 831, 837 (Bankr. N.D. Ill. 1986), *aff'd.*, 66 B.R. 548 (N.D. Ill. 1986), *aff'd.*, 831 F.2d 1292 (7th Cir. 1987).

198. 58 B.R. at 837.

The leading case in this context is *In re Levinson*,¹⁹⁹ where the court refused to give weight to a state court consent order in which the debtor had agreed that his debt would not be discharged in a subsequent bankruptcy case. The court focused on public policy considerations in holding that a debtor may not contract away his or her right to a bankruptcy discharge. The court further found that there was no effective waiver of discharge under § 727(a)(10), or effective reaffirmation of a single debt under § 524(c).²⁰⁰

C. Stipulations of Fact as Opposed to Mere Waiver

In *Klingman v. Levinson*,²⁰¹ the court held that, for public policy reasons, while the debtor may not contract away the right to a discharge in bankruptcy, a debtor may stipulate to the underlying facts that the bankruptcy court must examine to determine whether a debt is dischargeable. In *Jenkins*, the court suggested that had the stipulation been made closer in time to the order for relief, the factual admissions in the stipulation might be given greater weight.²⁰²

Stipulations pertaining to the character of the debtor's conduct, such as a debtor admission that "any subsequent bankruptcy filing is for the sole purpose of frustrating the secured lender," may be given more weight than an admission that "the debtor has no equity in the property" because the debtor's equity in the property is an objective measurement that can be more easily (if not more accurately) determined than a debtor's subjective intent.²⁰³

IV. THE LEGITIMACY OF WAIVERS

Although the legitimacy of waivers of the automatic stay is in doubt, persuasive arguments exist to permit such waivers. Three independent rationales, in fact, support the validity of these waivers: (1) encouragement of private workouts; (2) freedom of contract; and (3) privatization of the debtor creditor relationship in a way that resolves the common pool problem.

A. The Encouragement of Private Workouts

Courts have given substantial weight to encouraging out-of-court workouts. The Code itself recognizes that filing a bankruptcy petition is not always the most efficient means of restructuring the relationship between a debtor and its creditors.²⁰⁴ The House Report states that "[m]ost business arrangements, that is, extension of composition (reduction) of debts, occur out-of-court. The out-of-court procedure, sometimes known as common law composition, is quick and inexpensive."²⁰⁵ As the court in *Club Tower* stated:

Workouts and restructuring should be encouraged among debtors and creditors, particularly where, as here, there is a debt between two parties

199. *Id.* at 831.

200. *Id.* at 837.

201. 831 F.2d 1292, 1296 (7th Cir. 1987).

202. *In re Jenkins*, 181 B.R. 33, 36 (Bankr. E.D. Pa. 1995).

203. See Note, *supra* note 188, at 207.

204. Section 305(a)(1) states, "(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if— (1) the interests of creditors and the debtor would be better served by such dismissal or suspension...." 11 U.S.C. § 305(a)(1).

205. H.R. REP. No. 595, *supra* note 24, reprinted in 1978 U.S.C.C.A.N. at 5787.

and a single asset. Under these circumstances, filing for bankruptcy should be a last resort. In order to facilitate this goal, prepetition agreements should be enforced against a borrower who later files for bankruptcy. To hold otherwise could make lenders more reticent in attempting workouts with borrowers outside of bankruptcy.²⁰⁶

In *In re Colonial Ford*,²⁰⁷ the court recognized that there were at least three reasons Congress sought to encourage workouts: speed, cost and sensibility.²⁰⁸ Congress designed the Code to permit bankruptcy only as a last resort.²⁰⁹ Outside the bankruptcy context, a debtor and its creditors are removed from the dilatory structure of bankruptcy. They "enjoy a flexibility conducive to speed."²¹⁰ This is important to both parties because delay is "the most costly element in any bankruptcy proceeding and particularly in a business reorganization. The same amount of money received by a senior creditor four years from now is worth probably less than half of that same amount of money received today."²¹¹ A second consideration noted by the *Colonial Ford* court is the cost benefit of out-of-court workouts. An out-of-court workout avoids the committees and trustees and the throng of accountants and lawyers advising them. Moreover, bankruptcy may destroy business relationships necessary for a successful financial rehabilitation as sales may decline and the cost of obtaining vital credit may increase. The third consideration is the inherent sensibility of out-of-court settlements. Workouts often depend on cooperation, participation, and good faith. Bankruptcy litigation, on the other hand, is an adversarial process rife with competing zealotry, strategy, and dissension. The parties themselves are often better prepared than a judge, who often has few resources and little training, to rehabilitate a financially impaired company. "The courtroom is not a boardroom. The judge is not a business consultant."²¹² An additional consideration is the crowded dockets of bankruptcy courts.²¹³ Overcrowded dockets encourage judges to enforce these waivers if they are made by sophisticated parties, especially with the advice of counsel, since waivers go a long way to promote restructuring without the need for bankruptcy courts.

B. Freedom of Contract

The Bankruptcy Code contains no explicit provision forbidding waiver of the right to file a petition for relief.²¹⁴ However, such a waiver has never been

206. *In re Club Tower L.P.*, 138 B.R. 307, 312 (Bankr. N.D. Ga. 1991). *See also*, Note, *supra* note 188, at 205-06.

207. 24 B.R. 1014 (Bankr. D. Utah 1982).

208. *Id.* at 1016.

209. *Id.* at 1015.

210. *Id.* at 1016.

211. *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 490 (1977).

212. *In re Curlew Valley Assocs.*, 14 B.R. 506, 511 (Bankr. D. Utah 1981).

213. Note, *supra* note 188, at 209.

214. Section 706(a) provides that any waiver of the right to convert a Chapter 7 case to a Chapter 11, 12, or 13 case is unenforceable. The legislative history of this section suggests that a waiver of the right to file a bankruptcy petition is also unenforceable ("The explicit reference in Title 11 forbidding the waiver of certain rights is not intended to imply that other rights, such as the right to file a voluntary bankruptcy case under Section 301, may be waived.") H.R. REP. NO. 95-595, *supra* note 24, reprinted in 1978 U.S.C.C.A.N. at 5963, 6458.

enforced.²¹⁵ Since enforcing a debtor's waiver of this right would completely deny access to a "fresh start," public policy strongly opposes such waivers.²¹⁶ This is unquestionably the case if the waiver is obtained when the transaction was first contemplated, but Thomas Moers Mayer has suggested that this right is not as firmly embedded in the Code as it seems—such as when the waiver was obtained from a single-asset real estate debtor in the course of a workout agreement.²¹⁷ He cites *United States v. Royal Business Funds Corp.*,²¹⁸ where the court held that a debtor who consented to a federal receivership in exchange for a \$4 million loan from the Small Business Administration ("S.B.A.") had no absolute right to file a bankruptcy petition. The court found it relevant that the S.B.A. was the only significant creditor, the receiver had been operating the company for over a year, and the debtor offered no reason for filing.²¹⁹ As Mayer suggests, the typical single-asset real estate case, though not usually the subject of a federal receivership or the recipient of a federal loan, is much like the cited case because a private mortgagee often agrees to forbearance and occasionally advances additional funds in a workout agreement with the debtor.²²⁰

C. Privatization

A common pool problem exists when self-interested individuals act in a way that leads to a less than socially optimal result.²²¹ More technically, "a common pool problem exists when negative production or consumption externalities caused by the use of exhaustible resources cannot be resolved by the definition of property rights."²²² In other words, a negative consumption externality involves a situation where one's consumption limits another's ability to also consume. Returning to our earlier example of fish in a common pond,²²³ each time a fish is caught the pond is diminished for those who might fish later in the season.

In his celebrated work, *The Logic and Limits of Bankruptcy Law*, Thomas Jackson contends that one of bankruptcy's central functions, if not its core function, is to provide a consolidated method of distributing a debtor's property to creditors in a way which maximizes creditor wealth.²²⁴ In other words, bankruptcy seeks to solve the common pool problem by assuring that anglers do not rush to deplete the pond for their benefit at the expense of those

215. See *In re Club Tower L.P.*, 138 B.R. 307, 311–12 (Bankr. N.D. Ga. 1991); *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983) (agreement not to seek bankruptcy relief not enforceable).

216. McFarland, *supra* note 15, at 17; see also Bassin, *supra* note 18, at 10.

217. Thomas M. Mayer, *Bankruptcy-Proof Entities, Bankruptcy-Resistant Workouts, and Tolling Agreements*, Section III(A)(1) (page number unavailable), 402 PLI/REAL 37 (PLI Order No. N4-4585 (1994)).

218. 724 F.2d 12, 15 (2d Cir. 1983).

219. *Id.* at 16.

220. Mayer, *supra* note 217, at Section III(A)(1) (page number unavailable).

221. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 10 n.9, 12–14 (1986) (describing common pool problems and situations in which each individual is motivated by self-interest).

222. Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 369–70 (1993).

223. See *supra* notes 60–61 and accompanying text.

224. JACKSON, *supra* note 221, at 4, 14, 53, 128, 210, 212–13.

who come later. At least in part, this notion of preserving the common pool for the benefit of all is premised on the hypothesis that all anglers are individually benefitted by a policy which prevents depletion of a natural resource. Or, as Jackson might contend, bankruptcy seeks to prevent the dismemberment of a debtor's property because often the debtor's property, taken as a whole, has a value which exceeds that of the sum of its individual parts. The automatic stay plays a prominent role in solving the common pool problem by preventing one or more creditors from depleting the assets of the debtor's estate to the detriment of the other creditors and the value of the estate as a whole.

In the instant context, Jackson's treatment of ipso facto clauses—clauses which provide, for example, that a debtor is in immediate default if it declares bankruptcy—is particularly interesting. Although he acknowledges that such clauses may be justified because the lender often bargains and pays for these clauses in the form of a lower interest rate, he believes the predominant difficulty with arguments in favor of such clauses is that they

assume[] that the debtor bears the costs of this clause. An aspect of the problem of diverse ownership, however, exists here. These clauses would have an effect on a reorganization (where acceleration is not the order of the day) and might harm the remaining unsecured creditors by requiring them to pay for a (secured) claim at its face amount instead of its unaccelerated present value worth. The group that is likely to bear the costs of this clause in bankruptcy, accordingly, is not the debtor (or its shareholders) but the other creditors. Thus, the debtor may have no particular incentive in negotiating loans to exclude such clauses, and other creditors may have no effective way of forcing the debtor to exclude them. It may be preferable, therefore, to refuse to recognize clauses negotiated by the debtor whose impact will be felt almost exclusively by other creditors, notwithstanding their possible prophylactic role, because they have effect only upon insolvency (or similar occurrence).²²⁵

From Jackson's objections to ipso facto clauses, we might anticipate that he would also object to prepetition waivers in a multiple creditor scenario because their "impact [would likely]...be felt almost exclusively by other creditors."²²⁶ As he might contend, the principal problem with these clauses is that the debtor might have no incentive to negotiate with a dominant creditor to exclude such a clause, and yet the other creditors bear all the risk of such a clause's inclusion.

Cognizant of Jackson's likely objections, we acknowledge the valuable role that the automatic stay plays in preventing dismemberment of the debtor's estate and the limited incentive, or leverage, the debtor may have to prevent the imposition of such clauses. We also agree that creditors may have little, if any, ability to influence a debtor's decision to accept such clauses and yet bear many of the risks inherent in their adoption. That being said, however, we do not believe that a blanket prohibition on the enforceability of these clauses is appropriate. Rather, we advocate the judicial acceptance of these clauses in situations where there has been a privatization of the common pool problem between the debtor and a creditor. What do we mean by this? Consider the following example.

225. *Id.* at 42–43 (footnotes omitted).

226. *Id.* at 43.

Suppose Debtor X is an entity that owns a large real estate property in the state of Arizona. Suppose also that Debtor X has only one creditor, Creditor Y, and that Debtor X is in default with respect to an outstanding obligation to Creditor Y. Suppose finally that Debtor X has no equity in the asset at issue. At a meeting to discuss the default, Creditor Y proposes forbearance with regard to its immediate remedies under the loan agreement in exchange for Debtor X's agreement to waive its right to the automatic stay should Debtor X seek bankruptcy relief.

In this case, facing a severe financial crisis, Debtor X is likely to agree to such a proposal. If Debtor X does agree, why is that a problem, we might ask? Debtor X's agreement is certainly not problematic from the perspective of the common pool problem because there are no other creditors who have an interest in sharing in the pool of the debtor's assets. Put in other terms, the parties have privatized the common pool problem because there are no other parties with an interest or stake in Debtor X's assets. Because the costs attendant to the decision to waive the automatic stay by Debtor X are borne solely by Debtor X, the cost-benefit analysis of such a decision is thrust quite appropriately into the hands of the proper party. That being said, we conclude there is a persuasive argument for upholding the validity of waivers of the automatic stay in cases such as single asset real estate scenarios, where there is but one creditor and one debtor.

Of course, we readily acknowledge that our conclusion changes if a debtor has more than one creditor, unless all the creditors individually agree to permit the debtor to waive its right to an automatic stay. In that situation, where all the anglers have agreed to a fishing free-for-all, we see little reason to interfere. Some might contend that permitting waivers in the multiple creditor scenario, or where the debtor has some equity in the collateral, or where the entity itself might have a going concern value which likely exceeds its liquidation value and which is likely to inure to the benefit of the debtor, is inappropriate. We disagree. If all the creditors agree to a race to dismember, why should we interfere if they feel that is a superior mechanism for asset distribution to the formal procedures prescribed by the Bankruptcy Code? As to protecting the debtor's residual interest, we see no reason to interfere with a debtor's decision to forego its interest in exchange for creditor forbearance. To engage in paternal oversight of debtors, who are often quite sophisticated, makes little sense in this setting. Moreover, it is in the nature of business to be exposed to and to accept risk. To allow a debtor to reap the upside rewards of a business venture while eluding the risks of failure is inconsistent with the notions underlying a basic free market economy.

V. PRACTICAL CONCERNS REGARDING WAIVERS

In considering the advisability of utilizing a prepetition waiver of the automatic stay, the creditor's and debtor's concerns clearly diverge. Therefore, such considerations must be contemplated separately.

A. *Creditor Issues*

When thinking about the advisability of such a stipulation from the perspective of a creditor, the distinctions between the different types of agreements must be weighed. If a creditor enters into a self-executing waiver,

she must be aware of the fact that most bankruptcy courts appear to agree that waivers of the automatic stay are not self-executing—that is, that creditors must apply to the court for relief.²²⁷ Section 362(d) empowers the bankruptcy court to grant stay relief to a “party in interest” if “cause” exists to do so, after notice and a hearing. Since the Code does not define “cause,” it is highly likely that regardless of how the stipulation is drafted, the matter will end up before a tribunal which will determine whether cause exists to grant leave from the stay. As a consequence, it is advisable for creditors to draft stipulations which agree to a waiver *in addition to* acknowledgments and facts that will provide grounds for relief from the stay.

Additionally, if a creditor has a carefully drafted prepetition stipulation, the agreement itself may provide the creditor with in-hand evidence of the character of the debtor’s conduct in filing a subsequent bankruptcy petition. Moreover, even if the agreement is held to be unenforceable, the stipulation can still assist the court in judging the debtor’s conduct and facilitate the court’s “good faith” determination.²²⁸

Generally, it is advisable for a creditor to include the following when drafting a prebankruptcy workout and restructuring agreement:

- The lender shall be entitled to immediate relief from the automatic stay to permit enforcement of its rights and remedies under the loan documents and applicable state law;
- The borrower consents to the immediate termination of the automatic stay and agrees not to contest any motion filed by lenders for such;
- The borrower agrees that the exclusive period for it to file a plan in bankruptcy and seek acceptances of the plan will terminate on a given date, without extension; and
- The borrower admits the existence of certain facts that will support an order dismissing the case or terminating the automatic stay.²²⁹

Finally, it is notable that Peter Partee implies that it may be malpractice not to include a provision granting a creditor a waiver of the automatic stay in the event that the borrower files for bankruptcy.²³⁰

Even though the benefits a creditor may receive as a result of a prepetition waiver of the automatic stay are apparent, there are negative factors that may result from the use of such a stipulation. First, when considering a prepetition waiver, the court may be left with the impression that the creditor has been overreaching on the insistence of the provision. This could certainly taint the creditor’s stance in the entire case, which could lead to the subordination of the lender’s claim or subject the creditor to a lender liability claim. Secondly, should the waiver of the automatic stay be considered a breach of the debtor’s fiduciary duty, a lender may run the risk of a claim for aiding

227. See, e.g., *In re Sky Group Int’l*, 108 B.R. 86 (Bankr. W.D. Pa. 1989).

228. Note, *supra* note 188, at 202 n.12.

229. Stephen M. Goldberg, *Enforceability of Prebankruptcy Agreements Regarding the Automatic Stay*, 111 BANKING L.J. 200, 201 (1994).

230. Partee, *supra* note 14, at 10 (“more courts are likely to adopt the view that prepetition waivers of the automatic stay are enforceable in bankruptcy and lenders’ counsel may expose themselves to allegations of negligence by not recommending the use of such waivers in original loan documents and in workout agreements”).

and abetting a breach of fiduciary duty.²³¹ A third potential risk a creditor may run by entering into a prepetition waiver is that a debtor may argue that at the time the agreement was executed, the circumstances under which the filing occurred were never contemplated. The debtor might make the argument to escape the effect of a prepetition stipulation.²³² Similarly, because the court may look at the debtor's present conduct and the circumstances under which the petition is filed, the debtor may argue "change of circumstances" in attempting to justify its subsequent filing and prove to the court that it is a debtor worthy of the rehabilitative protection of Chapter 11.²³³

B. Debtor Issues

In considering the advisability of a prepetition waiver of the automatic stay from the debtor's viewpoint, several points become evident. While a court may be unlikely to hold that an agreement may be per se enforceable, such an agreement does hamper defending a motion for relief from stay.²³⁴ Additionally, as mentioned in the discussion on creditor issues, the waiver of the automatic stay may be considered a breach of fiduciary duty owed by an insolvent debtor to its creditors.²³⁵ It is important to remember that a bankruptcy court may consider a covenant when determining whether to dismiss a bankruptcy case as a bad faith filing.²³⁶ This provision provides evidence to a court that the debtor has already had the benefit from the creditor's prepetition consensual forbearance that a bankruptcy case would have afforded it.²³⁷ Finally, it might be wise, in some cases, for the debtor's attorney to consider the prospect of a filing earlier than one normally would, for the purpose of testing the enforceability of such prepetition waivers.²³⁸

CONCLUSION

Creditors in these cases have had ample justification for seeking prepetition waivers and stipulations. Most of these decisions involve single-asset real estate debtors. If the secured creditor has no equity cushion protection and the property's income is not meeting its expenses, the creditor needs to act quickly to limit losses. On the other hand, as the court pointed out in *Jenkins*, a single-asset real estate debtor loses all hope of reorganization when the secured creditor is allowed to foreclose on the property.²³⁹ Allowing the stay to be lifted without a factual inquiry seems to be an abdication of the court's responsibility to treat the debtor fairly.

231. See *Crowthers McCall Pattern, Inc. v. Lewis*, 129 B.R. 992, 999 (Bankr. S.D.N.Y. 1991) (discussing lender's liability for aiding and abetting a breach of fiduciary duty in the context of a fraudulent conveyance).

232. Note, *supra* note 188, at 206 n.43.

233. *Id.*

234. As an aside, one argument that such agreements are not per se enforceable is that the Chapter 11 debtor is a different legal entity than a prepetition debtor, thus the Chapter 11 debtor represents different interests (i.e. creditors). Fenning et al., *supra* note 87, at 39.

235. See *FDIC v. Sea Pines Co.*, 692 F.2d 973, 977 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

236. *In re Citadel Properties*, 86 B.R. 275, 276-77 (Bankr. M.D. Fla. 1988).

237. Fenning et al., *supra* note 87, at 39.

238. Martin I. Klien, 'No Second Bite' Clauses: Enforceable or Not?, N.Y.L.J., Oct. 6, 1994, at 6.

Congress recognized this conflict in the Bankruptcy Reform Act of 1994, and tried to forge a compromise. These revisions to the Code streamlined many bankruptcy procedures. Sections 101 and 218 of the 1994 Act both amend 11 U.S.C. § 362 to expedite automatic stay hearings. Section 101 of the Act amended 11 U.S.C. § 362(e) to require that the final hearing of a motion to lift the automatic stay be concluded thirty days after the preliminary hearing. Under the old statute, the final hearing needed only to commence within thirty days of the preliminary hearing. Section 218 of the Act amended 11 U.S.C. §§ 101 and 362(d) to create a new category of property and give creditors new rights to foreclose on it. Section 218 provides:

“single asset real estate” means real property constituting a single property or project other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than \$4,000,000.

Section 218 of the 1994 Act also created 11 U.S.C. § 362(d)(3), which allows creditors of single asset real estate to have the stay lifted if (A) the debtor has not filed a “feasible” reorganization plan within ninety days of filing, or (B) the debtor has not commenced monthly payments to secured creditors in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate.

With the revisions in § 362, a secured lender’s need to extract prepetition waivers and admissions is reduced. In the single asset real estate case, the burden of proof has been shifted to the debtor: the stay expires in ninety days unless the debtor acts to protect the creditor’s interest. A creditor no longer needs to show cause or lack of good faith. In all cases, the final hearing must now conclude within thirty days of the preliminary hearing.

These amendments to the Code forge a fair compromise. Limiting the single asset real estate category to property worth less than \$4 million allows the court to expedite the less complex cases and grant relief to the creditor more quickly. Also, the duration of the benefit the debtor receives from the automatic stay is limited so that a bad faith filing is not likely to cause the secured lender as large a financial loss. And for the single asset real estate debtor who files in good faith, ninety days of breathing space is provided to fashion a reorganization plan or commence payments.

Despite these changes, at present there remain several unanswered questions. First, debtors may have an enforceable fiduciary duty to all of their creditors.²⁴⁰ A debtor may breach that duty by granting a waiver to one creditor thereby giving her preference over the others. Lenders’ counsel assisting in this breach of fiduciary duty could face penalties.²⁴¹ On the other

239. *In re Jenkins Court Assocs. Ltd. Partnership*, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

240. *See* *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976–77 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

241. Craig H. Averch, *Bankruptcy Documents; Selected Drafting Issues (Including Issues in Anticipation of Insolvency)*, R181 ALI-ABA 1569, 1585 (1993).

hand, lenders' counsel could face malpractice charges for not recommending the use of a waiver.²⁴²

Second, "rubber stamp" enforcement of waivers could create a moral hazard problem. Most debtors, whether commercial or consumer, probably do not anticipate filing bankruptcy. Thus, most debtors would probably be willing to waive the automatic stay for immediate gains. However, widespread waiving of the stay could make bankruptcy obsolete for certain classes of debtors. Without the automatic stay, bankruptcy would be of little use because creditors could pursue their remedies against the debtor.²⁴³ Such a result is not likely under the current state of the law, but this and other concerns certainly obviate the necessity of limiting waivers to those situations which do not seriously impair the Code's underlying policies.

As the waiver cases demonstrate, the courts walk a fine line between competing policy goals. To prevent stepping too far over that line, courts should consider at least two factors before enforcing a waiver and promoting certain policies: first, the context in which a waiver will have any validity whatsoever, and second, the width that should be given a waiver in determining whether "cause" exists to lift the stay.

Because the case law on this topic varies so widely, the precise circumstances under which stipulations are enforceable are uncertain. The fact that such provisions lead to out-of-court settlements would seemingly lead the courts to enforce such provisions. However, it cannot be forgotten that the underlying policy of providing debtors with a chance to reorganize while preserving the estate for creditors exists, as does the potential for bad faith filings on behalf of debtors to avoid or hinder creditors' recovery. The emerging consensus is that a court should consider the waiver as one factor when deciding whether to lift the stay. Considering the recent amendments to the Bankruptcy Code, secured creditors need not be as fearful that their interests will be depreciated by drawn out lift-stay proceedings, so reliance on prepetition waivers and stipulations is no longer as crucial.

While it is unclear whether relief-from-stay provisions will be upheld in the future, the best case for their enforcement is the workout situation where consideration, such as forbearance, is clearly established, where few other creditors have or may assert significant claims against the debtor, and where there is no equity in the property in excess of the outstanding loan balance.²⁴⁴

242. For a sample of a potentially enforceable prepetition agreement, see Note, *supra* note 188, at 208-10.

243. For a discussion of the importance of the stay in the context of workout agreements, see Craig W. Friedrich, *Workouts*, 18 J. REAL EST. TAX'N 384 (1991).

244. Averch, *supra* note 241, at 1585.

