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## Waiver of Bankruptcy Protections in Pre-Bankruptcy Workout Agreements

Mikel R. Bistrow

*Partner, Luce, Forward, Hamilton & Scripps, LLP, San Diego, CA*

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# FEATURE ARTICLE

## Waiver of Bankruptcy Protections in Pre-Bankruptcy Workout Agreements

by Mikel R. Bistrow

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*Mikel R. Bistrow is a partner at the San Diego based law firm of Luce, Forward, Hamilton & Scripps, LLP. Ms. Bistrow specializes in bankruptcy, finance, and commercial transactions. Ms. Bistrow was graduated from the University of Michigan in 1976, where she received her B.A., with distinction, and her J.D. in 1981. This article is a reprinted adaption from Business Workouts Manual, 1995 Supplement, Copyright 1995 Warren, Gorham & Lamont 1.800.950.1205.*

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## I. Introduction

It is increasingly common for secured creditors to demand that workout agreements include provisions in which the debtor waives or agrees to modify bankruptcy protections. The judicial response to these provisions has been varied. This article discusses the enforceability of bankruptcy-related waiver provisions and the practical considerations in negotiating and drafting these provisions for pre-bankruptcy workout agreements. While the emphasis of this article is on agreements for relief from the automatic stay in contemplation of a later bankruptcy case, this article will also discuss waiver of other types of rights and the enforceability in a subsequent bankruptcy case of stipulations entered into in an earlier bankruptcy case.

## II. Typical scenario

Typically, negotiations over bankruptcy waiver provisions occur between a debtor in default and a secured creditor who is entitled to exercise its right to foreclose on collateral or otherwise terminate the lending relationship. The debtor is hopeful that with the additional time, and perhaps given other concessions, it will be able to resolve its problems without filing a bankruptcy case. The secured creditor may be willing to delay exercising its rights and to grant concessions, believing this approach is preferable to a bankruptcy filing. The secured creditor may also believe that it will benefit by the forbearance. Other times, the secured creditor believes that the debtor will not succeed and that foreclosure or bankruptcy is inevitable. Thus, the essence of the workout agreement between the debtor and the secured creditor is often that a later bankruptcy will not occur; if the debtor does

not succeed in solving its problems in the negotiated time period, the debtor will cooperate with the secured creditor by acceding to a foreclosure on the collateral or perhaps even by delivering a deed-in-lieu of foreclosure.

The secured creditor and its counsel, knowing that an agreement *not to file bankruptcy* is not enforceable as a matter of public policy,<sup>1</sup> may consider whether they can protect the secured creditor's position if the debtor does file bankruptcy by having the debtor waive the protection of the automatic stay.<sup>2</sup> Indeed, the debtor may be desperate to obtain concessions from the secured creditor and may be induced to promise anything in return. Counsel for the debtor should normally advise the debtor to refuse to agree to such a waiver. Counsel for both the secured creditor and the debtor should consider whether the waiver is enforceable and what other ramifications may follow from having a waiver in a pre-bankruptcy agreement. Both parties need to anticipate the positions that may be taken in negotiations. Will the other side really insist on its position to the end? Is it really nonnegotiable? How insistent should each side be?

While waiver provisions are most often seen in the context of a defaulted real estate loan, they are also occurring in the context of other types of commercial loans. Additionally, those provisions now address a broader range of bankruptcy concerns, such as the validity and enforceability of the creditor's claims, the waiver of affirmative claims of the debtor, the use of cash collateral, cramdown in the context of a plan of reorganization and dischargeability of debts.

## III. Types of waiver provisions

While most cases dealing with pre-bankruptcy waivers deal with waivers of the protec-

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tions of the automatic stay, the same general considerations may apply to other bankruptcy rights. For example, it is not uncommon for a pre-bankruptcy workout agreement to contain restrictions on the debtor's ability to use cash collateral (i.e., cash or cash equivalents in which another party, such as a lender, has a lien or other interest) upon a subsequent bankruptcy filing. Other possible waiver provisions include, but are not limited to: requirements regarding the provision of adequate protection to the lender; the granting of super-priority status for failure of adequate protection; acknowledgments as to the validity and perfection of the creditor's lien; a prohibition of the surcharge against a creditor's collateral under 11 U.S.C. § 506(c); the shortening or waiving of the debtor's exclusive time period to file a plan of reorganization under 11 U.S.C. § 1121; agreements regarding the assumption or rejection of executory contracts; and agreements or acknowledgments as to nondischargeability of debt. Very few cases have addressed pre-bankruptcy agreements involving these types of provision. However, it seems likely that the majority of courts will not, per se, uphold agreements dealing with such bankruptcy provisions. Most courts will, therefore, look to the facts and circumstances surrounding the pre-bankruptcy agreement and acknowledgments in the pre-bankruptcy agreement as a basis for making findings in the later bankruptcy case.

#### **IV. Practice issues regarding automatic stay waivers**

##### **A. General provisions**

The courts have been divided on whether waivers of the automatic stay are enforceable. Although the rulings in this area appear to be

decisions of law, it is apparent that the underlying facts are very important and provide the real explanation for most of the rulings. Before discussing the specifics of these cases, a few preliminary observations are in order.

First, although waivers of the automatic stay are sometimes treated as self-executing, it would be a serious error for a secured creditor to attempt to foreclose without an order of the bankruptcy court granting relief from the automatic stay. All of the cited cases arise in the context of a filed motion for relief from the stay. Moreover, courts have several times over commented such a motion is necessary.<sup>3</sup> To attempt to foreclose without filing a relief from stay motion may very well draw a sanction under § 362(h) of the Bankruptcy Code<sup>4</sup> or other applicable law. Given that fact, a secured creditor who wants to obtain a waiver and who does not want to appear over-reaching should draft language in contemplation of a hearing.

Second, nearly all of the decided cases, particularly those that appear to enforce the waiver, arise in the relief from automatic stay context with a common fact pattern: a single asset case with little or no equity in the property. It seems clear in many of these cases that in a pre-bankruptcy workout the secured creditor has given substantial concession. Therefore, if a bankruptcy case is filed and the stay remains in place, the secured creditor has not received the benefit of its bargain: the debtor after promising not to resist the creditor at the end of the forbearance period and then renege. In most cases, the court has gone out of its way to make clear that there is no equity in the property and that an effort at reorganization would be hopeless. In such cases it is probable that the real basis for granting relief from the stay was the presence of

sufficient other facts to constitute "cause" for relief from the stay or that the case was filed in bad faith, which in itself constitutes cause. In these cases, the pre-bankruptcy agreement is essentially treated as additional evidence supporting a finding of "cause" or bad faith.<sup>5</sup>

Third, a distinction should be made between an outright waiver of a bankruptcy right, such as the right to oppose a motion for relief from the stay, and stipulations of fact that would support a motion for relief from stay. For example, the debtor may agree that there is no equity in the property or that reorganization would be hopeless, and the facts supporting these conclusions may be spelled out in detail. Such stipulations of fact are less likely to be treated as void.<sup>6</sup>

## **B. Advisability - creditor's standpoint**

In the context of drafting a pre-bankruptcy workout agreement, there are two basic types of waiver provisions. The first is a self-executing waiver. The second is a waiver coupled with acknowledgments by a debtor of facts and circumstances that, when presented as evidence together with the waiver at a relief from stay hearing, will provide grounds for the court to find that relief from stay is appropriate (or that "cause" exists). These acknowledgments will operate to weaken the debtor's credibility at such a hearing should the debtor decide to oppose the relief from stay motion on a basis other than a dramatic change in circumstances.

As noted below,<sup>7</sup> even cases upholding relief from stay waivers have done so under circumstances where "cause" or other grounds existed for the granting of relief from stay separate and apart from the waiver itself. Admissions con-

cerning factual circumstances are likely to carry more weight than self-executing waivers. A court willing to recognize the futility of the debtor's reorganization effort at a relief from stay hearing may be less willing to enforce a pre-bankruptcy self-executing waiver of the debtor's rights without also considering whether there is independent cause for granting relief from stay (that is, whether bad faith exists, whether the debtor in fact has a realistic possibility of reorganizing, whether the bankruptcy was initiated only to delay foreclosure). Thus, the secured creditor should present as a basis for stay relief not only the waiver in the prepetition workout, but also the debtor's acknowledgment as to factual matters that would give rise to a finding that relief from stay is appropriate.

### **1. Enforcing the waiver**

Although the cases enforcing the waiver appear to be based on law, the finding of relief from stay in these cases is actually based on the totality of the facts. The leading case finding in favor of a relief from stay waiver is *In re Citadel Properties*.<sup>8</sup> In *Citadel*, the secured creditor agreed to a forbearance on its real estate foreclosure in exchange for an agreement that it would be entitled to immediate relief from stay should the debtor file a bankruptcy case. Following several earlier decisions,<sup>9</sup> the court in *Citadel* followed the provisions in the prepetition agreement.<sup>10</sup>

Another leading case "enforcing" a relief from stay waiver is *In re Club Tower, LP*.<sup>11</sup> In *Club Tower*, the bankruptcy court upheld a provision in a forbearance agreement that entitled the secured creditor to immediate relief from the automatic stay. The court distinguished an agree-

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ment waiving the benefits of the automatic stay from an absolute waiver of the debtor's right to file bankruptcy, which the court indicated would not be enforceable.

A third case supporting the secured creditor is *In re Orange Park South Partnership*.<sup>12</sup> In *Orange Park*, the debtor entered into a prepetition stipulation in a foreclosure action. The stipulation waived the debtor's defenses to the claim of the mortgagee, conceded that there was no equity in the property encumbered by the mortgage, and agreed that any subsequent bankruptcy filing by the debtor or a related partnership to whom the debtor deeded the real property would be admitted to be totally unfounded and filed solely for purposes of delay. After entering into the stipulation, a new partnership was created, the debtor delivered to it a deed for the real property, and the new partnership filed a chapter 11 bankruptcy case. The court found that the case presented many of the factors typically present in chapter 11 cases which are not filed in good faith. The court found particularly egregious the fact that the principals of the debtor had signed prepetition stipulations admitting the case was filed in bad faith. The court did not find any evidence that the prepetition stipulation was obtained either by coercion, fraud, or mutual mistake, and, thus, upheld the stipulation. *Orange Park* is particularly noteworthy for upholding prepetition acknowledgments (as opposed to waivers of rights) and further, for upholding the prepetition stipulation not of the newly created partnership debtor, but of its predecessor in interest.

The *Club Tower* case was more recently followed in *In re Cheeks*.<sup>13</sup> In *Cheeks*, the court addressed the issue as to whether to enforce a prepetition agreement by an individual debtor in

a chapter 13 not to oppose a relief-from-stay motion. The court, in upholding the waiver, found that there was no basis to limit the enforceability of relief-from-stay waivers to single-asset real estate cases or for providing more or less relief to particular classes of debtors.<sup>14</sup> Additionally, in *In re Powers*, the court held that relief-from-stay waivers are not per se invalid, but are not self-executing.<sup>15</sup> The court used a cause analysis and determined that an evidentiary hearing would be necessary. In *In re Wheaton Oaks Office Partners*, the bankruptcy court relied upon *Citadel Properties, Inc.* and *Club Tower*, and held that a prepetition court-approved contract waiving post-petition defenses is cause for relief from the automatic stay.<sup>16</sup>

One court that has followed the foregoing line of cases in enforcing a prepetition waiver, also imposed sanctions. In *In re McBride Estate*, the debtor's confirmed chapter 11 reorganization plan contained a provision consenting to relief from the automatic stay if the general partner of the debtor later filed bankruptcy.<sup>17</sup> Thereafter, the general partner filed his own chapter 11 case. Rather than stipulating to relief from the automatic stay, the debtor resisted a motion for relief brought by the secured creditor. The bankruptcy judge found that the agreement entered into in the partnership debtor's chapter 11 case was sufficient grounds for granting relief from the stay. On a subsequent motion, the court imposed sanctions in excess of \$4,000 on the debtor and his attorney under Bankruptcy Rule 9011<sup>18</sup> for opposing the secured creditor's motion for relief. The court agreed that a "radical new development" would have been an appropriate reason to oppose the motion for relief, but found that no such facts were presented and that the debtor had "failed to present a workable basis for relieving

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it of the obligations set forth in its previous agreement.”<sup>19</sup>

## **2. Negative factors for creditors**

Before including relief from stay waivers in workout agreements, the secured creditor should consider the potential negative consequences. Of primary concern is the impression that may be created on the bankruptcy court that the secured creditor has been overreaching in insisting on the inclusion of such a provision. Such a negative impression may taint the court’s view of the creditor throughout the case. The secured creditor should weigh the potential negative impression, especially where the other factual bases are not strong, and a good chance that the court will not grant relief from the stay even with a waiver in the agreement is evident. Along these same lines, where a bankruptcy court has found a creditor to be overreaching based on a pre-bankruptcy waiver agreement, the lender may find itself subject to liability, and its claim may even be equitably subordinated.<sup>20</sup>

Similarly, an acknowledgment of certain facts, for example, the value of property or financial status of the business may set a benchmark for the bankruptcy court to later determine that a material change in circumstances occurred. Such incidents mitigates against the very relief from stay the creditor is seeking. A change of circumstances may, therefore, be used as a basis for not enforcing such waivers or otherwise giving relief to a debtor from an agreement or court order.

Finally, to obtain inclusion of waiver provisions, the secured creditor may have to use bargaining chips unnecessarily. In light of issues

regarding the enforceability of such provisions, a secured creditor may not want to give up more valuable benefits in a workout agreement in return for a waiver of questionable value. Thus, inclusion of waivers must be considered on a case-by-case basis.

## **C. Advisability - debtor’s standpoint**

As discussed earlier in the scenario, counsel for the debtor should advise careful examination prior to signing a pre-bankruptcy waiver. Often, a debtor has little, if any, leverage in negotiating workout agreements. Secured creditors are increasingly insisting upon the inclusion of waivers as a prerequisite to entering into any workout agreement. From the debtor’s standpoint, agreeing to pre-bankruptcy waiver provisions creates a number of issues. Although such provisions may not be considered per se enforceable by most courts, a debtor should consider that such provisions may have, at least, a substantially adverse affect the prospect of successfully defending a motion for relief from the stay. As a result, a debtor should strongly weigh the benefits it receives by virtue of the pre-bankruptcy workout agreement against the potential loss of the protection of bankruptcy rights.

In addition, individuals who owe fiduciary duties to the debtor should be careful if the same agreement that waives valuable bankruptcy rights also contains benefits for them personally. Limited partners or minority shareholders may argue in such a case that those in control breached fiduciary duties or acted outside of the range of reasonableness in consenting to a waiver.

There is also a risk that an unsecured creditor will argue that a trustee should be ap-

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pointed because by conceding to a waiver or not opposing the motion for relief, the debtor has failed to act as an appropriate representative of the bankruptcy estate. The unsecured creditor may also argue that a trustee should not be bound by the waiver.

Finally, both the debtor and the debtor's counsel should consider if the need later arises to defend a motion to stay relief, counsel who participated in the negotiations may be in the difficult position of having to argue against its enforceability. It may be advisable to substitute new counsel to handle the bankruptcy case. On the other hand, it may be that the only real chance for the debtor to even attempt to reorganize or restructure debts is the workout agreement with its creditor. Lastly, it may be apparent that in the totality of the circumstances, more can be gained in other parts of the negotiation if there is a concession on the waiver point. The decision is a judgment call based on the specific facts and circumstances.

### 1. Refusing to enforce waiver

If the debtor has signed a waiver, courts have, under certain circumstances, refused to enforce these waivers. Until recently, the leading case denying the secured creditor the benefit of a prepetition waiver was *In re Sky Group Intern., Inc.*<sup>21</sup> In this case, the bankruptcy court refused to uphold a provision in a prepetition agreement to the effect that in the event of bankruptcy, the debtor "hereby consents to relief from the automatic stay . . . to allow [the lender] to exercise its rights and remedies with respect to the property."<sup>22</sup> The court based its refusal to uphold the debtor's prepetition waiver of the auto-

matic stay on the legislative history and public policy behind Section 362 of the Bankruptcy Code.<sup>23</sup>

More recently, in *Farm Credit of Central Fla.*,<sup>24</sup> the District Court for the Middle District of Florida declined to follow *Citadel* and refused to enforce a provision in which the debtor agreed not to contest a motion for relief from the stay in the event the debtor filed for bankruptcy protection. The provision was contained in a stipulation approved by a state court that extended the date of a foreclosure sale. The bankruptcy judge concluded that the agreement "was not in and of itself sufficient to lift the stay unless there is a showing of other criteria such as bad faith."<sup>25</sup> The district court upheld the bankruptcy court and noted that the facts of the case differed from earlier cases in which courts had expressly or implicitly determined that the debtor could not effectively reorganize. The debtor had a long history of operating businesses, had significant other creditors, and had already filed a plan or reorganization. This district court concluded:

It is the opinion of this Court that the Bankruptcy Court's holding that prepetition agreements providing for the lifting of the stay are "not per se binding on the debtor, as a public policy position," is consistent with the purposes of the automatic stay to protect the debtor's assets, provide temporary relief from creditors and promote equality of distribution among the creditors by forestalling a race to the courthouse. *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985). The automatic stay provision is intended to preclude the opportunity of one bankruptcy

creditor to pursue a remedy against the debtor to the disadvantage of other bankruptcy creditors and thus, to promote the orderly administration of the bankrupt's estate. *Triangle Management Servs. v. Allstate Sav. & Loan Assoc.*, 21 B.R. 699 (N.D. Cal. 1982). No other creditors were involved in the prepetition agreement, not did the Bankruptcy Court approve this agreement. The policy behind the automatic stay is to protect the debtor's estate from being depleted by creditors' lawsuits and seizures of property before the debtor has had a chance to marshal the estate's assets and distribute them equitably among creditors. *Martin-Trigona v. Champion Federal Sav. & Loan Assoc.*, 892 F.2d 575 (7th Cir. 1989). The Bankruptcy Court correctly determined that the agreement to waive the automatic stay was not self-executing.

Since even those cases that have enforced the waiver did so after considering the facts of the case, the view expressed in *Farm Credit of Central Fla.*, which explicitly adopts a middle position, making the stay waiver agreement *one* of the factors to be considered by the court, may become the predominant judicial position in this area.

#### V. Enforceability of waiver in serial filing cases

One of the most difficult issues involving waiver enforceability arises in serial filing cases, where a debtor has filed multiple bankruptcy cases, usually one right after another. Occasionally, a bankruptcy court order or a stipulation approved by a bankruptcy judge contains

a provision for relief from the stay in the first bankruptcy case and then purports to provide for relief from the stay in a later case. Courts have struggled with this situation, which presents an issue similar to enforcing a pre-bankruptcy waiver agreement previously described. However, serial filing, the debtor is not entitled to sympathy on the equities. Rarely are there underlying facts that would give courts inclination to be protective of the debtor. For that reason, courts have enforced stipulations entered in one case in a succeeding case on the basis of *res judicata*, although it is difficult to justify that reasoning in a later filing in which the facts are necessarily somewhat different.

Perhaps, the leading case in this area is *In re Franklin*, in which the bankruptcy court in the third of five serial bankruptcy 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.<sup>26</sup> The secured creditor had concluded a foreclosure sale three days after the third bankruptcy petition was filed. The debtors attempted to set aside the foreclosure sale, arguing that it was prohibited by the automatic stay that arose in the third bankruptcy filing. The bankruptcy court, upholding the order entered in the second case, held that the automatic stay was not effective in the third bankruptcy case and the sale was valid. The debtors appealed on the grounds that the bankruptcy judge in the second bankruptcy case had no jurisdiction to lift the automatic stay in future filings by means of a stipulated agreement or order. The district court and Ninth Circuit both affirmed the bankruptcy court's decision that the previous bankruptcy court had jurisdiction to approve the stipulation and that the stipulation

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removed the property from any automatic stay in future filings.

In a later case in the Ninth Circuit, the court reached the same result. In *In re Spring Park Assocs.*, the debtors filed a chapter 12 case in which they executed a stipulation regarding refinancing of certain debts.<sup>27</sup> The stipulation provided that the automatic stay was terminated and a waiting period was established before 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. The bankruptcy court's order was affirmed by the district court and by the Ninth Circuit.

Another case that has extensively discussed this issue is *In re Abdul-Hasan*.<sup>28</sup> Noting the Ninth Circuit decision in *In re Franklin*, discussed earlier, the bankruptcy court for the Central District of California 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 a subsequent bankruptcy case. The court further held that the prior relief granted removed any requirement that the creditor seek relief from the automatic stay in a subsequent filing. The debtor was collaterally estopped from attacking the previous order granting prospective relief. Further, the debtor was prevented from attach-

ing the prior order by *res judicata*. The prior order was binding in a subsequent action involving the same parties and the same issues. The court rejected the debtor's argument that the issues presented were different because of a change in circumstances. Afterwards, at the time of the subsequent filing, the debtor could have sought a temporary restraining order and injunction under Section 105 of the Bankruptcy 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 eighteen months that had passed between the entry of the original order and the filing of the subsequent case presented no issues of estoppel or laches that would prevent enforcement of the prospective order.<sup>29</sup>

On the other hand, at least one court, in the case of *In re Taras*, held that a bankruptcy court has no authority to grant prospective relief from stay.<sup>30</sup> The court, quoting *In re Norris*,<sup>31</sup> stated:

It is to be noted that there is nothing in the statutory language . . . which purports to enable the Bankruptcy Court to provide relief from the automatic stay in advance of the filing of a bankruptcy petition. That is, on its face, the statute makes the *automatic* in all bankruptcy proceedings. In my view, a bankruptcy judge in a pending proceeding simply does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings.<sup>32</sup>

The court did give *res judicata* effect to that portion of an order from an earlier bank-

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ruptcy case that dealt with bifurcation of the mortgagee's claim.

## VI. Enforceability of other provisions

In addition to relief from stay waivers, creditors may seek waivers of other debtor bankruptcy rights in pre-bankruptcy agreements. One of these provisions includes a waiver of the debtor's right to receive a discharge from its debt to the creditor.

Courts have been consistent in not enforcing a waiver of the right to discharge. The leading case in this context is *In re Levinson*.<sup>33</sup> In a decision ultimately affirmed by the Seventh Circuit, the bankruptcy court for the Northern District of Illinois 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 the right to a bankruptcy discharge. The court further found that there was no effective waiver of discharge under Section 727(a)(10), or effective reaffirmation of a single debt under Section 524(c).<sup>34</sup> *In re Levinson* has been cited with approval in *In re McClure* and *In re DePiero*.<sup>35</sup> Courts have used the same reasoning in refusing to enforce prepetition stipulations purporting to be reaffirmation agreements.<sup>36</sup> The courts have found that

these agreements did not meet the requirements of Section 524(c).<sup>37</sup>

As in the relief from stay situation, stipulations of fact have a much better chance of being enforced in the nondischargeability context than mere waivers. A good example is illustrated by *In re Hart*.<sup>38</sup> In *Hart*, the debtor executed a stipulation in a state court divorce action that included a provision that certain attorneys' fees were in the nature of support. In the subsequent bankruptcy case, the court stated that "[a]lthough the [d]efendant cannot contract away his right to discharge fees in a subsequent bankruptcy, the [d]efendant may stipulate [to] the underlying facts that the [c]ourt must examine to determine if the fees are dischargeable."<sup>39</sup> In other words, while a statement in a divorce decree cannot operate as a pre-bankruptcy waiver of the right to have nondischargeability issues decided in an adversary proceeding, the statement contained in a stipulation or consensual order can be given collateral estoppel effect in a subsequent dischargeability action.

## VII. Conclusion

Despite the apparent lack of any per se enforceability relief from stay, waivers are becoming more commonplace in pre-bankruptcy workout agreements. Both creditors and debtors should carefully review all of the circumstances

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before insisting on or agreeing to such provisions.

<sup>1</sup> E.g., *In re Citadel Properties, Inc.*, 86 B.R. 275 (Bankr. M.D. Fla. 1988); *In re Club Tower, L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991).

<sup>2</sup> See 11 U.S.C. § 362(a) (1994). Upon commencement of a bank-

ruptcy case, an "automatic stay" arises and acts as an injunction against most actions by creditors against a debtor and its assets. The primary purpose of the automatic stay is to give the debtor a "breathing spell" from creditor actions.

<sup>3</sup> See 11 U.S.C. § 362(d) (1994).

<sup>4</sup> 11 U.S.C. § 362(h) (1984) provides that: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Some courts have held that sanctions under this section are only available to individual debtors. *See, e.g., In re Goodman*, 991 F.2d 613 (9th Cir. 1993). Even so, other sanctions may still be available.

<sup>5</sup> In fact, none of the reported decisions appears to support the proposition that a waiver will be enforced *per se*.

<sup>6</sup> *See infra* "Enforceability of Other Provisions".

<sup>7</sup> *See infra* "Enforcing the Waiver".

<sup>8</sup> 86 B.R. 275 (Bankr. M.D. Fla. 1988).

<sup>9</sup> The court cited with approval *In re International Supply Corp. of Tampa, Inc.*, 72 B.R. 510 (Bankr. M.D. Fla. 1987); *In re BOSS Partners 1*, 37 B.R. 348 (Bankr. M.D. Fla. 1984); and upheld *In re Gulf Beach Dev. Corp.* 48 B.R. 40 (Bankr. M.D. Fla. 1985). In *Gulf Beach Dev. Corp.*, the court upheld the terms of a prepetition agreement in which the debtor received a foreclosure forbearance in exchange for agreeing that the mortgagee would be entitled to immediate relief from the automatic stay should the debtor file for protection under the Bankruptcy Code.

<sup>10</sup> *In re Citadel Properties, Inc.*, 86 B.R. at 276-277.

<sup>11</sup> 138 B.R. 307 (Bankr. N.D. Ga. 1991).

<sup>12</sup> 79 B.R. 79 (Bankr. N.D. Fla. 1987).

<sup>13</sup> 167 B.R. 817 (Bankr. D. S.C. 1994).

<sup>14</sup> *Id.* at 819. The court also noted that the automatic stay will not be lifted in all cases where a waiver exists; the court simply will not give weight to the debtor's objection. The court will still consider the objections of third parties. The court also found that a relief-from-stay waiver is not self-executing and must be enforced by motion.

<sup>15</sup> 170 B.R. 480 (Bankr. D. Mass. 1994).

<sup>16</sup> *In re Wheaton Oaks Office Partners*, [1992 US Dist. LEXIS 18781] (Bankr. N.D. Ill. 1992). *See also In re Hudson Manor Partners, Ltd.*, 28 C.B.C.2d 221 (Bankr. N.D. Ga. 1991) (following the *Citadel* and *Orange Park* cases).

<sup>17</sup> 154 B.R. 339 (Bankr. N.D. Fla. 1993).

<sup>18</sup> Federal Rule of Bankruptcy Procedure 9011 is very similar to Federal Rule of Civil Procedure 11, and requires signing of pleadings and other papers as certification that the assertion is grounded in fact and warranted by existing law or a good faith argument and authorizes sanctions for violation of the Rule.

<sup>19</sup> *In re McBride* at 342. The *Powers* court specifically disagreed with the sanction aspect of *McBride* (the debtor may contest the motion to lift the stay). *Id.* at 484.

<sup>20</sup> *See* 11 U.S.C. § 510 (1994)

<sup>21</sup> 108 B.R. 86 (Bankr. W.D. Pa. 1987).

<sup>22</sup> *Id.* at 88.

<sup>23</sup> The court stated:

The legislative history makes it clear that the automatic stay has a dual purpose of protecting the *debtor and all creditors* alike:

It gives the *debtor a breathing spell* from his creditors. It stops all collection efforts, all harassment, and all foreclosure action. 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. The *automatic stay also provides creditors protection*. Without it, 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 credits. *Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally*. A race of diligence by creditors for the debtor's assets prevents that. (Emphasis added).

To 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 *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 debtor allegedly waives its right to the automatic stay.

Although waiver of a stay by the debtor apparently was possible under the old Bankruptcy Act, such a waiver is not self-executing under the Bankruptcy Code. Relief from stay must be *authorized by the Bankruptcy Court*.

*Id.* at 88-89 (emphasis in original).

<sup>24</sup> *Farm Credit of Central Fla.*, 160 B.R. 870 (M.D. Fla. 1993).

<sup>25</sup> *Id.* at 873.

<sup>26</sup> 802 F.2d 324 (9th Cir. 1986).

<sup>27</sup> 623 F.2d 1377 (9th Cir. 1988).

<sup>28</sup> 104 B.R. 263 (Bankr. C.D. Cal. 1989).

<sup>29</sup> *See also In re Powers*, 170 B.R. 480 (Bankr. D. Mass. 1994), where the waiver was in a court-approved agreement in a previous case.

<sup>30</sup> 136 B.R. 941 (Bankr. E.D. Pa. 1992).

<sup>31</sup> 39 B.R. 85, 87 (E.D. Pa. 1984)

<sup>32</sup> *In re Taras*, 136 B.R. at 948.

<sup>33</sup> *In re Levinson*, 58 B.R. 832 (Bankr. N.D. Ill. 1986), *aff'd*, 66 B.R. 548 (N.D. Ill. 1986), *aff'd*, 831 F.2d 1292 (7th Cir. 1987).

<sup>34</sup> *See* 11 U.S.C. §§ 524, 727 (1984).

<sup>35</sup> *In re McClure*, 70 B.R. 955 (S.D. Cal. 1987); *In re DiPiero*, 69 B.R. 279 (Bankr. W.D. Pa. 1987). *See also In re Markizer*, 66 B.R. 1018 (Bankr. S.D. Fla. 1986) and *In re Giambetti*, 27 B.R. 492 (Bankr. D. Or. 1983).

<sup>36</sup> *See* 11 U.S.C. § 52(c) (1984).

<sup>37</sup> 11 U.S.C. § 524(c) (1984) provides:

An agreement between a holder of a claim and the debtor, the consideration for which, in whole or part, is based on a debt that is dischargeable in a case under this title is

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enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if-

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under the title, under bankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(C) the attorney fully advised the debtor of the legal effect and consequences of (i) an agreement of the kind specified in this subsection; and (ii) any default under such an agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states

that such agreement-

(A) represents fully informed and voluntary agreement by the debtor; and

(B) does not imposed an undue hardship on the debtor or a dependent of the debtor;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under his subsection, the court approves such agreement as -

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

<sup>38</sup> *In re Hart*, 130 B.R. 817 (Bankr. N.D. Ind. 1991).

<sup>39</sup> *Id.* at 847-48.

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